VOLUME I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 488

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

vs.

CHICAGO STOCK YARDS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 23, 1942
CERTIORARI GRANTED DECEMBER 7, 1942

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3730.

CHICAGO STOCK YARDS COMPANY,

PETITIONER FOR REVIEW,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS.
DECISION, MARCH 29, 1941.

RECORD ON PETITION FOR REVIEW.

VOLUME I.

Pages 1 to 574, inclusive.

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BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1942.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3730.

CHICAGO STOCK YARDS COMPANY,

PETITIONER FOR REVIEW,

v.

COMMISSIONER OF INTERNAL REVIEW.

RECORD ON PETITION FOR REVIEW.

[FILED IN CIRCUIT COURT OF APPEALS NOVEMBER 6, 1941.]

DOCKET NO. 83797.

CHICAGO STOCK YARDS COMPANY, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

APPEARANCES.

For Taxpayer:

Lawrence E. Green, Esq.,
Joseph K. Moyer, Esq.,
Francis B. Keeney, Esq.,
Edward J. Keelan Jr., Esq.,
J. N. Welch, Esq.,
Warren W. Grimes, Esq.,
J. Bond Smith, Esq.

For Commissioner:

O. W. Swecker, Esq.,
P. M. Clark, Esq.,
S. B. Pierson, Esq.,
A. D. King, Esq.,
R. H. Transue, Esq.

DOCKET ENTRIES.

1936

Apr. 23—Petition received and filed. Taxpayer notified. (Fee paid)

Apr. 23—Copy of petition served on General Counsel.

May 29—Amendment to petition filed by taxpayer. 6/1/36 copy served.

May 29—Answer filed by General Counsel.

Jun. 2—Copy of answer served on taxpayer.

1937

Oct. 26—Motion for circuit hearing at Boston, Mass. filed by General Counsel.

Oct. 30—Hearing set Dec. 1, 1937 on motion.

Dec. 1—Hearing had before Mr. Sternhagen on respondent's motion to place on Circuit Calendar. Oral motion to change from Boston to New York granted. Written motion to be filed.

Dec. 2—Motion for circuit hearing at New York City filed by General Counsel. 12/2/37 granted.

1938

Jul. 29—Hearing set beginning Oct. 3, 1938 at New York City.

Aug. 23—Motion for leave to amend petition, amendment lodged, filed by taxpayer. 8/23/38 granted.

Aug. 23—Motion to restore case to the General Calendar and set for Nov. 28, 1938 at Washington, D. C. filed by taxpayer.

Aug. 23—Motion to restore case to the General Calendar granted.

Aug. 23—Praecipes for appearances of J. N. Welch, Edward J. Keelan, Jr., Lawrence E. Green and

Francis B. Keeney as counsel for petitioner filed.

Aug. 24—Copy of motion and amended petition served on General Counsel.

Oct. 13—Answer to amendment to petition filed by General Counsel.

Oct. 26—Copy of answer to petitioner's amendment to petition served on taxpayer.

Nov. 8—Motion for a continuance to Jan. 15, 1939 filed by taxpayer.

1938

Nov. 8—Hearing set Nov. 9, 1938 on motion.

Nov. 8—Copy of motion and notice of hearing served on General Counsel.

Nov. 9—Motion for a continuance to Jan. 15, 1939 granted and continued to Jan. 30, 1939.

Nov. 9—Hearing had before Mr. Arundell on motion of petitioner to continue merit hearing to Jan. 1939—Objected to by respondent. Continued to Jan. 30, 1939.

1939

Jan. 30—Hearing had before Mr. Sternhagen on merits. Hearing continued to Jan. 31, 1939. Stipulation of facts filed, original and one copy with exhibits S-1 to S-69 inc. attached.

Jan. 31—Transcript of hearing of Jan. 30, 1939 filed.

Jan. 31—Hearing had before Mr. Sternhagen on merits. Hearing continued to Feb. 1, 1939.

Feb. 1—Hearing had before Mr. Sternhagen on merits. Hearing continued to Feb. 2, 1939.

Feb. 1—Transcript of hearing of Jan. 31, 1939 filed.

Feb. 2—Transcript of hearing of February 1, 1939 filed.

Feb. 2—Hearing had before Mr. Sternhagen on merits. Hearing continued to Feb. 3, 1939.

Feb. 3—Hearing had before Mr. Sternhagen on merits. Hearing continued to Feb. 6, 1939.

Feb. 4—Transcript of hearing of Feb. 3, 1939 filed.

Feb. 6—Hearing had before Mr. Sternhagen on merits. Hearing continued to Feb. 7, 1939.

Feb. 6—Transcript of hearing of Feb. 2, 1939 filed.

Feb. 7—Hearing had before Mr. Sternhagen on merits. Hearing continued to Feb. 8, 1939.

Feb. 7—Transcript of hearing of Feb. 6, 1939 filed.

Feb. 8—Hearing had before Mr. Sternhagen on merits. Hearing continued to Feb. 9, 1939.

Feb. 8—Transcript of hearing of Feb. 7, 1939 filed.

Feb. 9—Hearing had before Mr. Sternhagen on merits. Both briefs to be filed by 4 17 39. Briefs not to be served until briefs of both sides are filed. Briefs to be served simultaneously. Parties to have 20 days to file replies. Thereupon the case is to be considered submitted.

Feb. 9—Transcript of hearing of Feb. 8, 1939 filed.

Feb. 13—Transcript of Hearing of Feb. 9, 1939 filed.

Apr. 14—Brief filed by General Counsel. Mimeographed copies received 4 19 39.

Apr. 17—Brief filed by taxpayer. 4 18 39 copy served.

Apr. 19—Stipulation to correct the transcript of record filed.

May 1—Reply brief filed by taxpayer 5 8 39 copy saved.

May 8—Reply brief filed by General Counsel. Mimeographed copies received 5 11 39.

1940

Mar. 20—Findings of fact and opinion rendered, Mr. Smith. Decision will be entered under Rule 50.

1940

Mar. 22—Order that findings of fact and opinion promulgated 3/20/40 be corrected entered.

Apr. 5—Computation of deficiency filed by General Counsel.

Apr. 8—Hearing set April 24, 1940 on settlement.

Apr. 10—Hearing set June 19, 1940 on settlement. Revised notice.

Apr. 18—Motion to modify findings of fact and for additional findings of fact filed by taxpayer. 16 printed copies filed 4/19/40.

Apr. 18—Motion for further hearing before the full Board or a division of the Board filed by taxpayer. 16 printed copies filed 4/14/40.

Apr. 18—Motion for rehearing and for a further hearing on the grounds of newly discovered evidence and affidavit attached in support of motion filed by taxpayer. 16 printed copies received 4/19/40.

Apr. 18—Notice of appearance of Swagar Sherley as counsel for taxpayer filed.

Apr. 23—Notice to send all notices to Swagar Sherley filed by Joseph K. Moyer.

Apr. 23—Copy of motion served on General Counsel.

May 6—Praecipe for appearance of H. B. Weaver, Jr., as counsel for petitioner filed.

Jun. 8—Notice of appearance of J. Bond Smith and Warren W. Grimes as counsels for taxpayer filed.

Jun. 11—Motion for a continuance filed by taxpayer. 6/12/40 granted.

Jun. 12—Notice of withdrawal of Swagar Sherley and H. B. Weaver, Jr. as counsels for petitioner filed.

Jul. 5—Order setting hearing 7 18 40 on motion entered.

Jul. 18—Hearing had before Mr. Smith, Kern and Opper on motion to modify findings of fact and for additional findings of fact. Motion for rehearing and further hearing—C. A. V. Affidavit in further support of petitioner's motion (granted) filed. 20 printed copies.

Jul. 30—Transcript of hearing of July 18, 1940 filed.

Aug. 1—Copy of motion and affidavit of James A. McDonough in support of petitioner's motion for rehearing and for further hearing served on General Counsel.

Sep. 21—Order denying motion for rehearing and further hearing and setting for argument on Oct. 1, 1940 the motions "to modify findings of fact and for additional findings of fact and for further hearing entered. Memorandum sur order attached.

Oct. 1—Hearing had before Members Smith, Kern and Opper. Petitioner to modify findings of fact and for additional findings of fact and for further hearing. C.A.V. Petitioner's offer of proof re: order of Board 9 21 40.

Oct. 15—Transcript of hearing of 10 1 40 filed.

1941

Jan. 25—Order supplementing Board's findings of fact and denying motions to modify findings of fact and additional findings and for further hearings entered.

Feb. 11—Order that parties file recomputations of deficiencies for the years 1930, 1932 and 1933 if such are necessary in accordance with the Board's report promulgated 3 20 40 as

amended 1 25 41 on or before March 12, 1941 at which time hearing will be had thereon entered.

Mar. 1—Motion for special rule filed by taxpayer.

1941

Mar. 4—Motion for ruling preliminary to Rule 50 computation filed by taxpayer.

Mar. 6—Computation for entry of decision filed by taxpayer.

Mar. 6—Alternative computation for entry of decision filed by taxpayer.

Mar. 7—Order that motions of petitioner filed March 1 and 4, 1941 be denied entered.

Mar. 7—Copy of alternative computation served on General Counsel.

Mar. 12—Hearing had before Mr. Smith on settlement under Rule 50.

Mar. 19—Transcript of hearing of March 12, 1941 filed.

Mar. 29—Decision entered, Smith, Div. 5. Memorandum sur decision attached.

Jun. 13—Motion to fix the amount of bond at $6,919,300.00 filed by taxpayer.

Jun. 13—Order fixing amount of bond at $6,919,300.00 entered.

Jun. 27—Supersedeas bond in the amount of $6,919,300.00 approved and ordered filed.

Jun. 27—Petition for review by U. S. Circuit Court of Appeals, 1st Circuit, filed by taxpayer.

Jun. 27—Statement of points filed by taxpayer.

Jun. 27—Proof of service of petition for review and statement of points filed.

Jul. 23—Designation of contents of record filed by taxpayer.

Aug. 1—Motion for extension of 50 days from August 6, 1941, to complete and transmit the record filed by taxpayer.

Aug. 1—Order enlarging time to Sept. 25, 1941 to transmit and deliver record entered.

Aug. 14—Copy of an order from 1st Circuit re exhibits filed.

Aug. 14—Copy of an order from 1st Circuit extending time to Dec. 31, 1941 to prepare and transmit the record filed.

Oct. 10—Stipulation as to contents of record filed.

[Title omitted.]

PETITION.

[Filed April 23, 1936.]

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-3, SRW-90D) dated January 27, 1936, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation organized and created under the laws of the State of Maine, with a mailing address at 1 Court Street, Boston, Massachusetts, c/o F. N. Prince & Company.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on or after January 27, 1936.

3. The taxes in controversy are income taxes for the calendar years 1930, 1932 and 1933, and amount to $4,266,

436.99. Of this amount $4,175,468.09 represents taxes asserted under the provisions of section 104 of each of the Revenue Acts of 1928 and 1932, and $90,968.90 represents taxes asserted under the provisions of section 13 of each of the Acts mentioned.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) So much of the proposed deficiency as is based upon the application of section 104 of the stated acts is illegally asserted, in that those sections of the statute violate the Constitution of the United States.

(b) The proposed deficiency is erroneously asserted to the full extent that it is in any way, manner or form based upon the theory or assertion that the petitioner was created, organized or availed of during the taxable years 1930, 1932 and or 1933 for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed.

(c) The proposed deficiency is erroneously asserted to the full extent that it is in any way, manner or form based upon the theory or assertion that the petitioner is a mere holding or investment company, or that its gains or profits were permitted to accumulate beyond the reasonable needs of the business.

(d) The respondent in his notice of deficiency has wholly neglected and failed to state upon what grounds, if any, he invokes the provisions of section 104 of the Revenue Act of 1928 and/or 1932; neither does said notice in any way specify in what particular or particulars the petitioner is held to have violated the provisions of those statutes, and accordingly said notice is not such a notice of deficiency as provided for under

section 272 (a) of the Revenue Acts of 1928 and 1932, respectively.

(e) In determining the petitioner's taxable net income for the year 1930 the Commissioner has erroneously restored thereto and refused to allow as a deduction the sum of $499,973.08, representing the loss sustained by the petitioner upon the sale by it in 1930 of 1552 shares of the capital stock of the Central Manufacturing District Company, which said loss was taken as a deduction by the petitioner in its computation of its reported taxable net income.

(f) In determining the petitioner's taxable net income for the year 1932 the Commissioner has erroneously restored thereto and refused to allow as a deduction the sum of $227,202.03 representing the loss sustained by the petitioner upon the sale by it in 1932 of 3050 shares of the capital stock of the Stock Yards National Bank and 240 shares of the capital stock of the Central Manufacturing District Bank which said loss was taken as a deduction by the petitioner in its computation of its reported taxable net income. The Commissioner further erred in failing to find as a loss and allow as a deduction the sum of $233,426.53, being the cost of the said shares of the capital stock of said Stock Yards National Bank and said Central Manufacturing District Bank which became wholly worthless during the year 1932.

(g) In determining the petitioner's taxable net income for the year 1932 the Commissioner has failed to find that the petitioner is entitled to a deduction either as a business expense or as a loss sustained, the sum of $24,000.00 representing the liability incurred in that amount during the year 1932 by reason of a one hundred percent assessment ordered in 1932 by the bank-

ing authorities of the State of Illinois against the petitioner and by it ultimately paid on account of its ownerships of 240 shares of the capital stock of Central Manufacturing District Bank and which said shares of stock were by no means whatsoever enhanced or increased in value by reason of such assessment or payment thereof.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) In the first instance the petitioner alleges that it did not in any of the years 1930, 1932 or 1933 violate the provisions of the Revenue Act of 1928 and 1932 as set forth in each of said acts under Section 104 thereof, in that it was neither formed nor availed of in any of said years for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed. Still further the petitioner alleges that during none of said years was it a mere holding or investment company, nor were its gains and profits permitted at any time during said years to accumulate beyond the reasonable needs of its business. If, however, the Board should sustain the respondent in his determination that the provisions of Section 104 of each of the said Revenue Acts are applicable in the premises, then the petitioner alleges that the provisions of Section 104 of each of the Revenue Acts of 1928 and of 1932 violate the Tenth Amendment to the Constitution of the United States in that said sections of said acts constitute an attempt by Congress under the guise of a tax to exercise a power not delegated to the United States but one reserved to the several States; that the regulation of the internal affairs of corporations which are chartered by States

is reserved to the several States and governed as their Constitutions may declare or their Legislatures provide; and that all discretion as to the declaration of dividends has been committed to boards of directors by the Legislature of the State of Maine, under the laws of which State the petitioner was organized and by virtue of which it has existence.

Petitioner further alleges that the provisions of Section 104 of each of the Revenue Acts of 1928 and of 1932 seek to impose a tax or obligation for refraining from doing that which there is no obligation to do and which Congress is without authority either to direct or to compel; that the exaction sought to be imposed is made to depend upon vague and indefinite standards determinable, if at all, at the whim and caprice of the taxing authorities; that a burden is sought to be imposed upon a statutory net income by reason of an accumulation of "gains and profits" having no necessary relation in amount or source to such statutory taxable net income; that the classifications undertaken to be established by said sections are arbitrary and capricious; and that so conditioned as aforesaid, the exactions sought to be imposed by said sections of said Acts are violative of the Fifth Amendment to the Constitution of the United States.

Petitioner further alleges that by virtue of Section 104 of each of the Revenue Acts of 1928 and of 1932 there is sought to be imposed in the guise of an income tax an unconscionable burden neither warranted nor authorized by the Sixteenth Amendment to the Constitution of the United States; that said sections seek to lay a burden upon one taxpayer for the failure of another taxpayer to pay taxes neither imposed nor imposable under the law; that the burden sought to be

imposed is obviously penal in fact yet nevertheless is so conditioned as to imposition that the amount thereof has, at best, only the most indefinite relation to the amount of the surtax avoidance condemned by the statute; that so conditioned the exaction sought to be imposed is without warrant or justification under the specific provisions of the Sixteenth Amendment authorizing Congress to lay and collect taxes on incomes without apportionment; and that the implied powers granted as an incident to said Amendment do not authorize the imposition of a penalty so conditioned as to fact and circumstance; and, accordingly, if the exaction were made it would offend the Due Process clause of the Fifth Amendment.

(b) Irrespective as to the force, validity or constitutionality of Section 104 of the Revenue Acts of 1928 and 1932, petitioner alleges that it did not in any of the years 1930, 1932 and or 1933 violate the provisions of either of said sections of said acts. This, the petitioner asserts, notwithstanding that the respondent has not in his notice of deficiency set forth any factual grounds in support of his invocation of said statutes. In support of its allegation, as here made, the petitioner submits the following matter:

I.

The petitioner is a corporation organized under the laws of the State of Maine. Its charter, dated September 25, 1911, grants to the petitioner exceptionally broad corporate powers in conformity with which its business has at all times been conducted. Petitioner's authorized capital stock is $8,000,000 in 80,000 shares, each of the par value of $100, all of which was paid up, issued and outstanding during each of the years 1930, 1932 and 1933.

The organization of the petitioner had its inception in a proposal in the nature of an aggeement, dated June 30, 1911, prepared by a committee of which Richard Olney was Chairman. This proposal ("Plan") was submitted to the common stockholders of the Chicago Junction Railways and Union Stock Yards Company, a New Jersey corporation, (sometimes hereinafter referred to as the New Jersey Company).

The circumstance giving rise to the preparation and submission of the "Plan" and the ultimate organization of the petitioner was principally the fact that the grant of corporate authority in the charter of the New Jersey Company was couched in such restrictive terms as seriously to restrain and hamper it in the management, control and financing of its operations and business as the same existed at that time.

Pursuant to said proposal the petitioner was chartered as aforesaid and on October 1, 1914 in accordance with the terms of an agreement then entered into, the petitioner in accordance with its charter authorizations entered upon its various undertakings as the same related to the conduct of the affairs of the New Jersey Company and its associated corporations.

As of October 1, 1914, the New Jersey Company owned or controlled subsidiaries as follows:

1. *Union Stockyards and Transit Company*, an Illinois corporation, owning and operating stock yard properties, probably the largest in the world, as well as other large holdings in buildings, banks, warehouses, hotels, etc. located on some five hundred acres of land within the limits of Chicago, Illinois.

2. *Chicago Junction Railway Company*, an Illinois corporation owning a belt line railway serving the stock yards and the Central Manufacturing District areas.

3. *Produce Terminal Company*, an Illinois public service

corporation furnishing power and light to the Chicago stock yards district.

4. *Stock Yards Harness and Saddlery Company*, an Illinois corporation, the business of which is indicated by its name.

5. *Chicago Junction Railroad Company*, an Illinois corporation, operating a line of elevated railways.

6. *Central Manufacturing District*, a Massachusetts Trust, owning some three hundred acres of land in Chicago, Illinois, improved with business and manufacturing structures, leased to and occupied by approximately three hundred tenants engaged in diverse industries and occupations.

In the creation of the petitioner it was the purpose and intent of the organizers to provide a facility so circumstanced in position and power that extensive properties and business activities above indicated might have a centralized and lawfully authorized source of management and control, all directed to the most efficient and remunerative operation of the several enterprises in the group.

On the above showing of a date of organization (1911) long prior to the effective date of the 16th Amendment to the Constitution or of Section 104 of the governing Revenue Acts, and of the purpose and intents then existing petitioner at this point alleges that it was neither created, organized nor formed for the purposes interdicted by Section 104 of either of the Revenue Acts of 1928 or 1932.

II.

The petitioner next alleges that such portions of its gains and profits for the years 1930, 1932 and 1933 as were not divided or distributed in those years were not permitted to accumulate for the purpose of preventing the imposition of the surtax upon its shareholders, but on the contrary were retained by the petitioner for lawfully corporate uses as

duly authorized by its charter; deemed proper by its board of directors; and fully warranted and justified in the light of petitioner's needs and most particularly so by reason of economic and business conditions existing and known to exist in each and all of those years.

As bearing upon the apportionment of its gains and profits between amounts distributed and amounts retained the petitioner alleges that the fixed and fluctuating charge obligations of the petitioner were such as to justify and to require the maintenance of a large surplus reflected by cash or "quick assets".

By legally enforceable obligations entered into prior to 1930 and continuing until years subsequent to 1933 the petitioner had bound itself directly and by way of guaranty to the payment of annual fixed charges in excess of $1,700,000.

By agreements and obligations equally enforceable by law the petitioner had bound itself directly and by way of guaranty to pay annually large amounts, fluctuating to some extent in amount, but certain in incidence. These obligations, subject to be paid by petitioner represent in the main its guarantee to assume and to pay certain of the operating costs, including taxes, of the New Jersey Company, and its subsidiaries. The obligations so guaranteed were in the years 1930, 1932 and 1933 in the approximate amount of $500,000 per annum and could reasonably be expected in future years materially to exceed that amount.

These fixed and fluctuating charge obligations, totalling an annual amount in excess of $2,000,000 were guaranteed as to payment by petitioner at all events, and wholly without respect to the circumstance it might have no annual earnings whatsoever out of which to meet the same when and if called upon so to do.

Petitioner further alleges that it was incumbent upon it

in each of the years 1930, 1932 and 1933 to retain and hold a portion of its gains and profits for those years in order that it should be prepared to pay, at maturity, very material obligations in the form of bond obligations.

As of December 31, 1930, petitioner was directly liable for the payment of $3,137,000 of its "5 per Cent Gold Bonds" due and payable in October 1961 unless default should be made in the payment of interest whereupon the principal would immediately become due and payable.

The petitioner was further bound at all times here concerned either as guarantor or indirectly obligated, and by imperative economic necessity, to the payment of the bonded and mortgage indebtedness of the said New Jersey Company and of its subsidiary companies, existing on December 31, 1930 in a total amount in excess of $19,000,000 of which amount $14,000,000 was due and payable April 1, 1940; further, the several bond obligations were subject to demand and payment immediately upon default in interest or installment of principal as duly provided in the several mortgage instruments and further so conditioned by mortgage agreement as to the majority of such obligations that default in interest could be avoided through the medium of additional borrowings by the primary obligors only under the most onerous conditions; and further, the money market at all times here concerned was such that in any event the borrowing of funds for this or any purpose was of the most remote possibility.

The petitioner knew at all times here concerned and the Board will judicially notice that in the year 1929 there occurred a great collapse of values of all classes of property, commodities and securities, that the depression then commenced progressively became greater, and continued through the year 1933 compelling the conclusion even then that the depression and the state of economic distress was

not temporary. Accordingly, petitioner alleges that in withholding from distribution a portion of its gains and profits for the years 1930, 1932 and 1933 its action was based upon determinations made in the full knowledge that from year to year it was faced with the ominous possibility of meeting burdensome obligations with no certainty whatsoever of current gains or profits sufficient to meet all or any part of such charges. Such determinations were likewise made in realization that a very material portion of the bonded debt of petitioner's associated companies fell due within a comparatively short period and that due to the wide spread conditions of financial distress it was reasonably certain that refunding or refinancing at the maturity dates could not be effected. It was accordingly incumbent upon petitioner at all times here concerned to be so fortified in its financial position that it would meet any or all of the said burdens, lest the failure so to do in any particular should precipitate the collapse of petitioner's economic and industrial structure.

Petitioner further asserts that in retaining a portion of its gains and profits for the years 1930, 1932 and 1933 its reasons for and belief for the necessity for such action were by no means based solely upon apprehension and conjecture. On the contrary the petitioner was in fact during the period of those years called upon to financially aid and assist the several companies in its operating group and did advance to them approximately five million dollars to protect and conserve its interest therein, all directed to the prevention of losses which if sustained might well have resulted in realized losses in excess of total gains and profits for the years here involved.

Petitioner likewise asserts and maintains that the retention of a portion of its earnings from year to year finds full warrant and justification by reason of the fact that the sev-

eral operating companies from which flow the principal part of petitioner's earnings are so circumstanced as to statutory and other forms of regulatory control and particularly as to the charges they may lawfully make for their services and products, that neither those companies nor the petitioner are in a position whereby the revenues to be received through operations may be adjusted to meet the conditions of increased costs of operation and production or the various hazards and exigencies encountered in their operation. Even more, certain of the operating companies, by reason of their public service nature may be compelled to continue their activities notwithstanding that operations may result in loss rather than earnings, which losses the petitioner may be compelled to absorb by reason either of its guaranty agreements or of economic necessity.

Petitioner further alleges that in each of the years 1930, 1932 and 1933 and in years prior thereto it received large sums in the name of dividends from the New Jersey Company and the same were accounted for on the books and records of the petitioner as income. These sums in the aggregate amounted to many millions of dollars and if such sums had been retained by the New Jersey Company and employed by it in setting up on the books of that company a reserve for a sinking fund, as it might properly have done, with respect to its bonded debt and other obligations, then the surplus account of the petitioner would have been $10,492,885 less on December 31, 1930, $11,862,122.51 less on December 31, 1932 and $12,685,590.70 less on December 31, 1933. The petitioner deeming itself either directly or indirectly bound to the payment of such debts and obligations of the New Jersey Company it was proper for it to retain in its surplus account undistributed said sums, and to have done otherwise would have been contrary to good

accounting practice, sound business judgment and established legal principles.

In determining in each of the years 1930, 1932 and 1933 what portion of its gains and profits should be distributed as dividends, petitioner took into consideration all facts and circumstances, as the same related to or bore upon the gains and profits of each of said years. Inescapable consideration was given to the circumstance that due to the depression vast shrinkage had taken place in the values of petitioner's properties and to their underlying assets. Regard was had to the matter of maintaining the established dividend rate and policy and to the duty laid upon petitioner by law to declare and pay as dividends no greater amount than was consistent with wise administration of a going concern. The dividends declared and paid and the amount of gains and profits withheld from distribution were determined solely upon factors and considerations surroundings the requirements of the business as then circumstanced and with no purpose or intent whatsoever of preventing the imposition of the surtax upon petitioner's stockholders.

III.

Petitioner alleges that it paid dividends in the amount of $400,000 in 1930, $400,000 in 1932 and $400,000 in 1933; and that the ratio of said dividends to petitioner's gains and profits for each of said years was materially in excess of dividends to profits generally declared and paid in each of said years by other corporations; and suggesting to the Board that the word "reasonable" is a relative term and that which would be reasonable in one situation may be clearly unreasonable in another, petitioner alleges its dividends paid in each of said years to have been "reasonable" in the premises, and that to have declared and paid divi-

dends greater than those distributed would have been in reckless disregard of attendant facts and circumstances and in violation of the duties and obligations laid upon petitioner by law.

IV.

Petitioner is not a mere holding or investment company. On the contrary the petitioner is engaged in the active management and control of a group of associated companies most broadly engaged in diversified fields of enterprise. At all times here concerned the several companies in the associated group have looked ultimately to the petitioner both for direction and control in all matters of policy, basic plan and scheme of operation. Petitioner has at all times acted as the fiscal and financial agency for the entire group, advancing from time to time its own funds or arranging for borrowings, upon the great bulk of which petitioner is guarantor as aforesaid. So circumstanced with relation to the several companies in the group petitioner alleges that it is not a "mere holding or investment company" within the ordinary meaning of that term or as used and employed in Section 104 of the Revenue Act of 1928 and 1932.

V.

Petitioner's gains or profits have not been permitted to accumulate beyond the reasonable needs of its business. On the contrary petitioner alleges that its true and actual surplus computed and determined with due respect to all relevant factors not only was not beyond the reasonable needs of its business but in truth and in fact was in such amount as to be insufficient and unreasonably below its actual necessities when judged in the light of prudence and provident business administration. This petitioner alleges in the light of the facts and circumstances above set forth

showing the burden of debt and obligation it was bound to meet as guarantor thereof and in view of further facts immediately hereinafter set forth.

Petitioner's surplus account as shown on its books for each of the years 1930, 1932 and 1933 is in effect materially overstated by reason of the fact that there is reflected therein in each of said years amounts representing the "recorded receipts" of dividends from the New Jersey Company as above mentioned. Proper adjustment of the books and accounts of petitioner and of the New Jersey Company so as to set up a proper sinking fund in the accounts of the latter company and properly to show the state of account between that company and petitioner by reason of said dividend payments discloses petitioner to have been so circumstanced in relation to such dividend payments to it that petitioner's book surplus as of December 31, 1930 was overstated in excess of $10,000,000, was overstated as of December 31, 1932 in excess of $11,800,000 and overstated on December 31, 1933 in excess of $12,680,000.

Petitioner alleges that upon elimination of no more than the immediately above disclosed overstatements its surplus is reduced to such a degree as to be wholly inadequate for its ordinary and necessary needs; and that when further and proper reserves are set up to reflect reasonable provisions for petitioner's fixed and fluctuating charge obligations, together with reasonable reserves to reflect the diminution of asset values due to the depression, petitioner has in fact but the least, if any at all, actual accumulated gains and profits.

(c) In computing its reported taxable net income for the year 1930, petitioner took, as a deduction from gross income, the amount of $499,973.08, representing the loss sustained in that year upon the sale of 1552 shares of the capital stock of the Central Manufacturing District Company.

The said stock was acquired by petitioner in the year 1925 at a cash cost of $500,000. During the year 1930, petitioner placed said shares of stock in the hands of a brokerage firm for sale at public auction; such sale was duly advertised; and the shares were sold to the highest bidder. The net proceeds of such sale received by petitioner were $26.92 resulting in a loss on the sale of $499,973.08 which was sustained by the taxpayer in the year 1930, and was deducted as aforesaid in the computation of its taxable net income for that year.

(d) Petitioner in computing its taxable net income for the year 1932 took as a deduction the amount of $221,202.03 representing the loss sustained upon the sale in that year of 3050 shares of the capital stock of Stock Yards National Bank and 240 shares of the capital stock of Central Manufacturing District Bank. The said shares of stock had been acquired by the petitioner in years prior to 1932 at a cash cost of $233,426.52 and were sold in 1932 with cash proceeds to the petitioner of $12,224.50, so that upon such sale petitioner sustained a loss of $221,202.03, as above stated. The respondent in his computation of petitioner's taxable net income for the year 1932 has disallowed the said sum of $221,202.03 as a deduction on the grounds that both petitioner and its vendee under said sale were both under the complete control of Mr. Frederick H. Prince and by reason of such control of both vendor and vendee no deductible loss was sustained by reason of the sale.

Petitioner alleges that the sales here involved were bona fide transactions, lawfully entered into and concluded by separate legal entities whereunder, for full and adequate considerations the transfers were made and as a result thereof petitioner sustained a loss as above set forth. However, and in the alternative, if it be the finding of the Board that the transfers so made were ineffective to divest the

petitioner of all right, title and interest in and to said shares of stock, then the Board should find that petitioner is entitled to a deduction from gross income in the year 1932 in the sum of $233,426.53, representing the cost of said shares of stock which became wholly worthless and without value during the year 1932, whereby petitioner, if still the owner of the same on December 31, 1932 sustained a loss in the amount of the cost thereof as above set forth.

(c) Petitioner alleges that in computing and determining its taxable net income for the year 1932 it is entitled to a deduction either by way of a loss sustained or as a business expense, in the sum of $24,000.00, representing a 100% assessment made in that year by the banking authorities of the State of Illinois against and upon 240 shares of the capital stock of the Central Manufacturing District Bank owned during a part of the year 1932 by the petitioner and which assessment it later duly paid. The said bank was closed in June 1932 on order of the Auditor of Public Accounts of the State of Illinois and was not thereafter reopened or reorganized. On October 11, 1932, the receiver of said bank, acting under the authority of the said Auditor issued his call for the assessment aforesaid. As of December 31, 1932 the said Bank stock was wholly worthless, notwithstanding the 100% assessment made thereon, so that by reason of such assessment and payment the petitioner acquired nothing of value, and accordingly is entitled to a deduction of said amount. Petitioner keeps its books and makes its return upon the accrual system of accounting and therefore the assessment so made represented an accrued liability owing by the petitioner on December 31, 1932. In determining its reported taxable net income for the year 1932, petitioner took no deduction in respect to said $24,000 assessment, nor did the respondent give any effect thereto

in his computation of taxable net income as shown in the notice of deficiency.

6. WHEREFORE, the petitioner prays that this Board may hear the proceedings and determine that;

(a) The petitioner is not subject to tax in any of the years 1930, 1932 and 1933 under the provisions of Section 104 of the Revenue Acts of 1928 and 1932;

(b) The Board find that Section 104 of the Revenue Acts of 1928 and 1932 is unconstitutional and of no force and effect;

(c) The taxable net income of petitioner for the year 1930 should be so computed and determined as to give effect to deduction of $499,973.08, representing the loss sustained on the sale of securities in that year as above set forth;

(d) The taxable net income of petitioner for the year 1932 should be so computed and determined as to give effect to a deduction of $221,202.03 or $233,426.52 representing either the loss on the sale of securities in that year or the loss sustained by reason of said securities becoming wholly worthless in that year;

(e) The taxable net income of petitioner for the year 1932 should be so computed and determined as to give effect to a deduction of $24,000 on account of and in respect to the 100% assessment made in that year against the stock holdings of petitioner in the Central Manufacturing District Bank as aforesaid;

(f) That the deficiency, if any, due from this taxpayer in each of the years 1930, 1932 and 1933 be recomputed accordingly.

JOSEPH K. MOYER, *Counsel for Petitioner*
1343 H Street, N. W., Washington, D. C.

Of Counsel:

WEYMOUTH KIRKLAND, Esq.,
WILLIS B. NANCE, Esq.
F. R. C. STEELE, C.P.A.
CRAIG L. REDDISH, Esq.

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF NORFOLK } ss.

April 7, 1936.

Then personally appeared James A. McDonough who on his oath says, that he is Vice-President of the petitioner in this proceeding, and as such is duly authorized to verify the foregoing petition; that he has read the petition or has had the same read to him and is familiar with the statements contained therein, and that the facts stated therein are true except as to those facts stated to be upon information and belief and those facts he believes to be true.

JAMES A. McDONOUGH, Vice-President,
Chicago Stock Yards Company.

Subscribed and sworn to before me this 17 day of April, 1936.

FRANK R. PEGRAM,
Notary Public

EXHIBIT A

[Filed May 29, 1936.]

AMENDMENT TO PETITION.

Jan 27 1936

IT:AR:B-3
RSW 90D

Chicago Stock Yards Company,
1 Court Street,
Boston, Massachusetts.

Sirs:

You are advised that the determination of your income tax liability for the year (s) 1930, 1932 and 1933 discloses a deficiency of $4,266,436.99 as shown in the statement attached

In accordance with section 272 (a) of the Revenue Act of 1928 and section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting

an early assessment of the deficiency and will prevent the accumulation of interest since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING, *Commissioner.*
By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement
Form 870

STATEMENT.

IT:AR:B-3
RSW-9OD

In Re: Chicago Stock Yards Company,
1 Court Street,
Boston, Massachusetts.

Income Tax Liability.

Years	Income Tax Liability	Income Tax Assessed	Deficiency
1930	$1,910,467.38	$ 92,781.28	$1,817,686.10
1932	1,315,135.44	13,496.47	1,301,638.97
1933	1,160,075.13	12,963.21	1,147,111.92
Totals	$4,385,677.95	$119,240.96	$4,266,436.99

Reference is made to Bureau letter dated December 5, 1933, relative to your income tax liability for the taxable year 1930. Reference is also made to your protests dated July 11, 1933, September 27, 1933, August 25, 1934 and April 16, 1935 and to the information submitted at hearings held with your representatives.

At the suggestion of your attorney, Mr. Joseph K. Moyer, your income tax liability for the years 1932 and 1933 is included herein without affording an opportunity for a hearing.

After careful consideration of your Federal income tax returns, the protests mentioned above and all other available information, the Bureau holds that your corporation is subject to taxation under section 104 of the Revenue Acts of 1928 and 1932.

The computation is as follows:

1930.

Net income reported on return		$ 773,177.36
Additions:		
1. Bad debt disallowed	$ 13,386.00	
2. Loss on sale of stock disallowed	499,973.08	513,359.08
Net income (section 21)		$1,286,536.44
Additions:		
3. Dividends received	$2,217,331.68	
4. Interest on United States obligations	8,297.91	2,225,629.59
Net income (section 104(c))		$3,512,166.03

Explanation of Adjustments

1. This item has been disallowed for the reason that no evidence as to worthlessness has been presented. It appears that demand for payment was not made nor any action taken in order to substantiate worthlessness. Accordingly, it is not deductible under article 191, Regulations 74.

2. The loss on the sale of the stock of the Central Manufacturing District Company has been disallowed for the reason that from the evidence presented it does not appear that your corporation sold the same thing, carrying the

same rights, that if received when purchased. Accordingly, it is held that the loss sustained was not such a loss as is contemplated by section 23 (f) of the Revenue Act of 1928.

3 and 4. These items are a part of net income within the meaning of section 104(c) of the Revenue Act of 1928.

Computation of Tax.

Net income (section 21)	$1,286,536.44	
Tax at 12% (section 13)		$ 154,384.37
Net income (section 104(c))	3,512,166.03	
Tax at 50% (section 104(a))		1,756,083.01
Total tax assessable		$1,910,467.38
Tax assessed, account #401545		92,781.28
Deficiency		$1,817,686.10

1932.

Net income reported on return		$ 98,156.14
Additions:		
1. Recovery of coupon interest	$ 4,516.39	
2. Loss on sale of securities disallowed	222,007.03	226,523.42
Total		$ 324,679.56
Deduction:		
3. Profit on bonds canceled		14,000.00
Net income adjusted (section 21)		$ 310,679.56
Additions:		
4. Dividends received	$2,216,260.35	
5. Interest on United States obligations	17,894.09	2,234,154.44
Net income (section 104(c))		$2,544,834.00

Explanation of Adjustments.

1. This item represents accrued interest on bonds purchased in 1931 which was refunded in 1932 and omitted from income reported. The item is a part of income as defined in section 22 of the Revenue Act of 1932.

2. Losses sustained upon the sale of 3050 shares of Stock Yards National Bank stock and 240 shares of Central Manufacturing District Bank have been disallowed for the reason that after the sale they were owned or controlled by the same individual as before the sale, Mr. Frederick H. Prince. In the case of the Stock Yards National Bank the stock was sold through F. H. Prince & Co., brokers, to F. H. Prince & Co., Inc., the entire stock of this corporation was issued to Mr. Frederick H. Prince in exchange for 48,000 shares of the stock of your corporation of which stock Mr. Prince owned the controlling interest. On June 3, 1932, Mr. Prince created a trust for the benefit of his wife and children to which trust he transferred the entire capital stock of F. H. Prince & Co., Inc. Both your corporation and the corporation to which these shares were transferred are in the complete control of Mr. Frederick H. Prince. The 240 shares of the Central Manufacturing District Bank stock were transferred on December 31, 1932 through the same brokers and to the same investment company as the 3050 shares mentioned above.

In the decision of the United States Circuit Court of Appeals, 8th Circuit, No. 10079, March Term, Decided April 19, 1935, in the case of Sydney Schoenberg in which a similar question was involved the Court said in part: "The taxpayer has not actually changed his position and is no poorer than before the sale. The particular sale may be real but the entire transaction prevents the loss from being actually suffered. * * *

The loss sustained on the sale of 10,000 shares of New York Central Railroad Company's stock is not deductible for the reason that they were held less than two years and may not be offset by profits on United States bonds. Article 272, Regulations 77.

The losses disallowed are:

Stock Yards National Bank	$139,414.63
Central Manufacturing District Bank	81,787.40
New York Central Railroad Company	805.00
Total	$222,007.03

3. The profit reported upon the cancellation in 1932 of $200,000.00 of your own bonds originally sold in June, 1922 and reacquired in October, 1922 has been eliminated from income. General Counsel Memorandum 10739, Cumulative Bulletin XI-2, page 65, holds that bonds purchased by the issuing corporation, are retired at the time of purchase.

4 and 5. These items are a part of net income within the meaning of section 104 of the Revenue Act of 1932.

Computation of Tax.

Net income (section 21)	$310,679.56	
Tax at 13¾% (section 13)		$ 42,718.44
Net income (section 104(c))	$2,544,634.00	
Tax at 50% (section 104(a))		1,272,417.00
Total tax liability		$1,315,135.44
Tax assessed, account #401883		13,496.47
Deficiency		$1,301,638.97

1933.

Net income reported on return	$ 94,277.90
Additions:	
1. Profit on sale of securities held more than 2 years understated	1,446.11
Total	$ 95,424.01

Deduction		
2. Profit on sale of securities held less than 2 years overstated		100.00
Net income (section 21)		$ 95,324.01
Additions:		
3. Dividends received	$2,197,221.52	
4. Interest on United States obligations	1,390.63	2,198,612.15
Net income (section 104(c))		$2,293,936.16

Explanation of Adjustments.

1. Profit reported in item 10(b)	$ 28,701.53
Correct amount	29,847.64
Understatement	$ 1,146.11

Profit from the sale of securities held more than 2 years is computed in accordance with section 111 of the Revenue Act of 1932 and is as follows:

Selling price	$206,205.90
Less:	
Cost	176,358.26
Profit	$ 29,847.64

2. Profit reported on sale of your own bonds	$. 5,297.50
Correct profit	5,197.50
Overstated	$ 100.00

Your records indicate that the above bonds cost you when purchased $8,802.50 instead of $8,702.50 used in computing the profit.

3 and 4. See explanation for items 4 and 5 for 1932.

Computation of Tax.

Net income (section 21)	$ 95,324.01	
Tax at 13¾% (section 13)		$ 13,107.05
Net income (section 104(c))	$2,293,936.16	
Tax at 50% (section 104(c))		1,146,968.08
Total tax liability		$1,160,075.13
Tax assessed, account #401650		12,963.21
Deficiency		$1,147,111.92

Reference is made to your claim for refund of $3,300.00 for 1932.

The claim is based upon the contention that you are entitled to deduct $24,000.00 on account of the payment in May, 1934 of the 100 per cent assessment against you as owner of 240 shares of Manufacturing District National Bank stock, notice of which was received in October.

Since you refused to make payment of the assessment at once and contested the issue for a time before payment the amount is not deductible under Income Tax Ruling 2843, Cumulative Bulletin XIV-1, page 77, in the taxable year.

Official notice of the disallowance will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

A copy of this letter has been mailed to your representatives, Joseph K. Moyer, 1343 H Street, N. W., Washington, D. C., Kirkland, Fleming, Green and Martin, 33 North La Salle Street, Chicago, Illinois, Patterson, Teele and Dennis, 1 Federal Street, Boston, Massachusetts, in accordance with the authority conferred upon them in the powers of attorney, executed by you and on file with the Bureau.

[Title omitted.]

ANSWER.

[Filed May 29, 1936.]

The Commissioner of Internal Revenue, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, for answer to the petition of the above-named taxpayer admits and denies as follows:

(1) and (2) Admits the allegations contained in paragraphs (1) and (2) of the petition.

(3) Admits that the taxes in controversy are income taxes for the calendar years 1930, 1932 and 1933, and amount to $4,266,436.99, but denies the remainder of paragraph (3) of the petition.

(4) Denies the allegations of error contained in subparagraphs (a) to (g), inclusive, of paragraph (4) of the petition.

(5) (a) Denies the allegations contained in subparagraph (a) of paragraph (5) of the petition.

(5) (b) Denies the allegations contained in subparagraph (b) and paragraphs I to V, inclusive, thereunder, of paragraph (5) of the petition.

Denies generally and specifically each and every allegation set forth in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

HERMAN OLIPHANT,
General Counsel for the
Department of the Treasury.

Of Counsel:

PHILIP M. CLARK,
STANLEY B. PIERSON,
Special Attorneys, Bureau of Internal Revenue.

[Title omitted.]

PETITIONER'S MOTION TO AMEND PETITION.

[Filed August 23, 1938.]

Now comes the above-named petitioner and moves for leave to amend the original petition filed in this action in accordance with its amendment accompanying this motion.

J. N. WELCH, *Counsel for Petitioner.*
60 State Street,
Boston, Massachusetts.

Granted August 23, 1938.

Ernest H. Van Fossan, *Member*
U. S. Board of Tax Appeals.

[Title omitted.]

PETITIONER'S AMENDMENT TO PETITION.

[Filed August 23, 1938.]

Now comes the above-named petitioner and amends the original petition filed in the above entitled action as follows:

(1) By inserting the following three paragraphs numbered (4)(h), (4)(i), and (4)(j) to follow after paragraph (4)(g) in the original petition as filed:

(4)(h) In determining the petitioner's net income for the year 1930, as the term "net income" is used in Section 104 of the Revenue Act of 1928, the Commissioner has erroneously determined that the amount of dividends received by the petitioner was $2,217,331.68 and has erroneously increased the petitioner's net income as defined in Section 21 of the Revenue Act of 1928 by an amount of $2,217,331.68 representing the

dividend deduction under Section 23(p) of the Revenue Act of 1928.

(4)(i) In determining the petitioner's net income for the year 1932, as the term "net income" is used in Section 104 of the Revenue Act of 1932, the Commissioner has erroneously determined that the amount of dividends received by the petitioner was $2,216,260.35 and has erroneously increased the petitioner's net income as defined in Section 21 of the Revenue Act of 1932 by an amount of $2,216,260.35 representing the dividend deduction under Section 23(p) of the Revenue Act of 1932.

(4)(j) In determining the petitioner's net income for the year 1933, as the term "net income" is used in Section 104 of the Revenue Act of 1932, the Commissioner has erroneously determined that the amount of dividends received by the petitioner was $2,197,221.52 and has erroneously increased the petitioner's net income as defined in Section 21 of the Revenue Act of 1932 by an amount of $2,197,221.52 representing the dividend deduction under Section 23(p) of the Revenue Act of 1932.

(2) By inserting the following three paragraphs numbered (5)(F), (5)(G), and (5)(H) to follow after paragraph (5)(E) in the original petition as filed:

(5)(F) In filing its corporation income tax return for the calendar year 1930, the petitioner erroneously reported as dividends received from domestic corporations the sum of $2,217,531.08 and erroneously took the same amount as a deduction from net income. The Commissioner erroneously determined that the dividends received by the taxpayer for the year 1930 and

the amount of the dividend deduction were $2,217,331.68 as reported by the taxpayer.

The error of the taxpayer and the Commissioner arises from the following facts:

During the year 1930 the taxpayer received distributions from The Chicago Junction Railways and Union Stock Yards Company (hereinafter called the New Jersey Company) in the sum of $1,978,897.68 and included all of said amount in its return as dividends received. However, at least $600,000. of said distribution from the New Jersey Company to the taxpayer during the year 1930 was not made out of earnings or profits accumulated by the New Jersey Company subsequent to February 28, 1913 but was made out of earnings or profits of that company accumulated prior to such date or out of the capital of that company.

(5)(G) In filing its corporation income tax return for the calendar year 1932, the petitioner erroneously reported as dividends received from domestic corporations the sum of $2,216,260.35 and erroneously took the same amount as a deduction from net income. The Commissioner erroneously determined that the dividends received by the taxpayer for the year 1932 and the amount of the dividend deduction were $2,216,260.35 as reported by the taxpayer.

The error of the taxpayer and the Commissioner arises from the following facts:

During the year 1932 the taxpayer received distributions from the New Jersey Company in the sum of $1,996,664.10 and included all of said amount in its return as dividends received. However, at least $600,000. of said distribution from the New Jersey Company to the taxpayer during the

year 1932 was not made out of earnings or profits accumulated by the New Jersey Company subsequent to February 28, 1913 but was made out of earnings or profits of that company accumulated prior to such date or out of the capital of that company.

(5)(H) In filing its corporation income tax return for the calendar year 1933, the petitioner erroneously reported as dividends received from domestic corporations the sum of $2,197,221.52 and erroneously took the same amount as a deduction from net income. The Commissioner erroneously determined that the dividends received by the taxpayer for the year 1933 and the amount of the dividend deduction were $2,197,221.52 as reported by the taxpayer.

The error of the taxpayer and the Commissioner arises from the following facts:

During the year 1933 the taxpayer received distributions from the New Jersey Company in the sum of $1,995,460.44 and included all of said amount in its return as dividends received. However, at least $600,000. of said distribution from the New Jersey Company to the taxpayer during the year 1933 was not made out of earnings or profits accumulated by the New Jersey Company subsequent to February 28, 1913 but was made out of earnings or profits of that company accumulated prior to such date or out of the capital of that company.

J N Welch, *Counsel for Petitioner.*
60 State Street, Boston, Massachusetts.

STATE OF RHODE ISLAND }
COUNTY OF PROVIDENCE } S.S.

August 22, 1938.

Then personally appeared F. R. Pegram who on his oath says, that he is Treasurer of the petitioner in this proceeding, and as such is duly authorized to verify the foregoing petition or has had the same read to him and is familiar with the statements contained therein, and that the facts stated therein are true except as to those facts to be upon information and belief and those facts he believes to be true.

F. R. PEGRAM, *Treasurer*,
Chicago Stock Yards Company.

Subscribed and sworn to before me this 22nd day of August, 1938.

DANA M. SWAN,
Notary Public.

My commission expires June 30, 1941.

[NOTARIAL SEAL.]

[Title omitted.]

ANSWER TO PETITIONER'S AMENDMENT TO PETITION.

[Filed October 13, 1938.]

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to petitioner's amendment to petition admits and denies as follows:

(1) (4)(h) to (j), inclusive. Denies the allegations of fact and assignments of error contained in subparagraphs

(4)(h) to (j), inclusive, of paragraph (1) of petitioner's amendment to petition.

(2) (5)(f) to (h), inclusive. Denies the allegations of fact and assignments of error contained in subparagraphs (5)(f) to (h), inclusive, of paragraph (2) of petitioner's amendment to petition.

Denies generally and specifically each and every allegation set forth in petitioner's amendment to petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

J. P. WENCHEL, *Chief Counsel,*
Bureau of Internal Revenue.

Of Counsel:

PHILIP M. CLARK,
TIMOTHY G. HISTON,
Special Attorneys,
Bureau of Internal Revenue.

[Title omitted.]

STIPULATION OF FACTS.

[Admitted in Evidence Feb. 9, 1939.]

It is hereby stipulated and agreed by and between the parties to the above action that the facts and figures contained in this stipulation and the exhibits which accompany it are true; without prejudice to the right of either party to introduce other and further evidence not inconsistent herewith.

1. THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO (hereinafter referred to as Transit Co.) is a corporation duly organized under special act of Illinois legis-

lature dated February 13, 1865. A copy of said statute accompanies this stipulation and is marked S-1. The capital stock authorized by its charter was $1,000,000. divided into 10,000 shares of a par value of $100. each. This authorized capital stock was increased by amendments to its charter as follows:

To $1,500,000. on March 7, 1867

To $4,400,000. on June 2, 1876

To $13,200,000. on July 3, 1890

The books of the Transit Co. containing the entries relative to such increases are not in existence. Such records as are available relative to such increases are attached marked S-2 and S-2A.

Section 10 of the Charter has never been amended.

All of said stock was represented by shares of a par value of $100. and was issued prior to 1911.

During the years 1911, 1912 and 1913 over 98% of the capital stock of this company was owned by the Chicago Junction Railways and Union Stock Yards Company, a New Jersey corporation, (hereinafter referred to as the New Jersey Co.); and after December 31, 1913 up to the present date this company was a wholly owned subsidiary of the New Jersey Co.

A statement showing the income received and dividends paid by the Transit Co. for the years 1911 to 1933 inclusive accompanies this stipulation and is marked S-3. Balance sheets of the Transit Co. as of December 31 of each year from 1911 to 1933 inclusive accompany this stipulation and are marked S-4.

The surplus of the Transit Co. as shown in S-4 is according to the books. It is agreed that the following adjustments should be made in the surplus account of the Transit Co. as shown by its books as set forth in S-4, in order that

said account may reflect a correct statement of earned surplus under the applicable Revenue Acts.

The surplus account of the Transit Co. as shown by its books as set forth in S-4, should be decreased by the following sums on the dates noted: December 31, 1930—$16,712,750.42; December 31, 1931—$16,537,331.81; December 31, 1932—$16,360,068.12 and December 31, 1933—$16,117,657.46. These decreases should be made to eliminate assets which were written up with an offsetting credit to surplus.

The surplus account of the Transit Co. as shown by its books as set forth in S-4, should be increased for each such year by the sum of $2,707,136.07, of which $1,397,821.09 reflects a transfer to this account of the reserve for new construction, and $1,309,314.98 represents a restoration for plant assets charged to expense in prior years.

On the balance sheets of the Transit Co., which are S-4 attached to this stipulation, the following intercompany items existed in addition to those so identified on the balance sheets.

Balance Sheet as of December 31, 1929.

The item "Accounts and Other Notes Receivable" includes the following:

Due from *Railway Co.	$1,041.66
Due from *C.M.D.	19.68
Due from New Jersey Co.	82,500.00

The item "Debenture Notes" includes bonds of the Transit Co. of a face value of $15,000, owned by the Maine Co.

Balance Sheet as of December 31, 1930.

The item "Accounts and Other Notes Receivable" includes the following:

Due from Railway Co.	$ 1,041.66
Due from C. M. D.	54.73
Due from New Jersey Co.	97,500.00

*Full name is Chicago Junction Railway Company.
*Full name is Central Manufacturing District.

Balance Sheet as of December 31, 1931:

The item "Accounts and Other Notes Receivable" includes the following:

Due from Railway Co.	$ 1,041.66
Due from C. M. D.	112.99
Due from New Jersey Co.	112,500.00

Balance Sheet as of December 31, 1932.

The item "Accounts and Other Notes Receivable" includes the following:

Due from Railway Co.	$ 1,041.66
Due from C. M. D.	177.22
Due from Central Storage & Forwarding Co.	58.80
Due from New Jersey Co.	127,500.00

Balance Sheet as of December 31, 1933.

The item "Accounts and Other Notes Receivable" includes the following:

Due from Railway Co.	$ 1,041.66
Due from C.M.D.	595.06
Due from Central Storage & Forwarding Co.	78.58
Due from New Jersey Co.	142,500.00

During each of the years 1921 to 1931 inclusive a portion of the income of the Transit Co. received for reweighing charges was impounded and held in a special fund in the name of the Transit Co. subject to a determination of a rate hearing of the Department of Agriculture. On April 15, 1930 a decision sustaining the charges was rendered; and in 1932 the impounded income and bank interest earned thereon, amounting in the aggregate to $2,426,433.29, was included in income upon the books of the Transit Co. for that year. In its balance sheet for each of the years 1921 to 1931 inclusive the amount of such impounded cash and bank interest credited to the end of the year was included

in the item "Cash"; and on the liability side the amount of such impounded income and interest was included in the item "Clearing Account". The amount of such income received and impounded and the interest thereon for each year from 1921 to 1931 inclusive and the total amount of the impounded income and interest on hand at the end of each such year is as follows:

	Impounded Income and Interest thereon during Year	Total Impounded Income and Interest at End of Year
1921	$ 33,655.10	$ 33,655.10
1922	206,185.85	239,840.95
1923	191,260.90	431,101.85
1924	330,098.87	761,200.72
1925	288,819.76	1,050,020.48
1926	257,946.52	1,307,967.00
1927	239,166.97	1,547,133.97
1928	233,662.53	1,780,796.50
1929	232,727.04	2,013,523.54
1930	200,263.28	2,213,786.82
1931	212,646.47	2,426,433.29
1932	0.	0.

2. The Stock Yards Harness and Saddlery Company (hereinafter referred to as Harness and Saddlery Co.) is a corporation duly organized prior to January 1, 1911. At all times material to this case this company was a wholly owned subsidiary of the Transit Co.

A statement showing the income received and dividends paid for the years 1911 to 1933 inclusive accompanies this stipulation and is marked S-5. Balance sheets of the Harness and Saddlery Co. as of December 31 of each year from 1911 to 1933 inclusive accompany this stipulation and are marked S-6.

3. The Chicago Junction Railway Company (hereinafter referred to as Railway Co.) is a corporation duly organized under Illinois law on April 26, 1898.

Prior to the formation of this company, the New Jersey Co. owned all of the capital stock of two corporations, (1) the Chicago Hammond & Western Railroad Company which owned a belt line railroad (known as the "Outer Belt") in Chicago and its vicinity, and (2) the Chicago & Indiana State Line Railway Company which operated another belt line railroad (known as the "Inner Belt") in the same vicinity directly serving the Chicago Stock Yards, under lease from the Transit Co. dated December 15, 1897, a copy of which lease is attached marked S-7. The Railway Co. was organized as a consolidation of the foregoing two railroad companies with an authorized capital stock of $2,200,000, divided into 22,000 shares of a par value of $100. each. This stock was all issued. The authorized capital stock was increased December 10, 1913 to $5,500,000, consisting of 55,000 shares of a par value of $100. each; and the additional 33,000 shares so authorized were declared and paid as a stock dividend in 1913 to the New Jersey Co. The Railway Co. was at all times a wholly owned subsidiary of the New Jersey Co.

In 1907 the Railway Co. sold the "Outer Belt" to Indiana Harbor Belt Railway Company receiving bonds of the latter company maturing in 1957 of a par value of $2,500,000. These bonds were guaranteed by Lake Shore & Michigan Railroad Company and Michigan Central Railroad Company and bore interest at the rate of 2% until 1912, 3% until 1917, and 4% thereafter. These bonds were taken in by the Railway Co. according to its books at a value of $2,286,427.84. The trustee under a Mortgage and Deed of Trust executed by the New Jersey Co. on April 10, 1900 (a copy of which accompanies this stipulation marked S-24) demanded that said bonds be deposited as additional collateral security under said Mortgage and Deed of Trust; and these bonds were delivered to the trustee and are still

held by the trustee as such collateral. Upon delivery of these bonds to the trustee the Railway Co. wrote them off its books and wrote up the value of its remaining assets by the same amount, namely, $2,286,427.84. These bonds were not entered upon the books of the New Jersey Co. as an asset, and have never been so carried. The New Jersey Co. paid a commission of $50,000. upon the sale of the "Outer Belt" and carries upon its books and in its balance sheets the item "Indiana Harbor Belt R. R. Co. Bonds—$50,000."

On December 1, 1913 the Transit Co. and the Railway Co. entered into a lease, a copy of which is attached as Exhibit D. to an Indenture of Lease entered into on May 19, 1922 between the Railway Co., the Transit Co., The Chicago River and Indiana Railroad Co., and the New York Central Railroad Company. The said leases may be introduced in evidence at the hearing.

A statement showing the income received and dividends paid by the Railway Co. for the years 1911 to 1933 inclusive accompanies this stipulation and is marked S-8. Balance sheets of the Railway Co. as of December 31 of each year from 1911 to 1933 inclusive accompany this stipulation and are marked S-9. Up to the present date the Railway Co. has been a wholly owned subsidiary of the New Jersey Co.

The surplus of the Railway Co. as shown in Exhibit S-9 is according to the books. It is agreed that the following adjustments should be made to the surplus account of the Railway Co. as shown by its books as set forth in S-9, in order that said account may reflect a correct statement of earned surplus under the applicable Revenue Acts.

The surplus of the Railway Co. on December 31, 1930, 1931, 1932 and 1933, as shown by its books as set forth in S-9, should be decreased by $2,286,427.84 representing a

write-up of the value of "Inner Belt" credited to surplus account in the year 1907.

For each of said years the surplus of the Railway Co. as shown by its books as set forth in S-9, on December 31 should be increased by the sum of $3,775,561. of which $3,300,000. represents a stock dividend declared and paid by it in 1913 to the New Jersey Co. and $475,561. represents additions and betterments charged to expense in years prior to 1918.

On each of the balance sheets of the Railway Co., which are S-9 attached to this stipulation, for December 31, 1929, 1930, 1931, 1932 and 1933 the item "Accounts Payable" includes $1,041.66 due from the Railway Co. to the Transit Co.

4. The Chicago Junction Railroad Company (hereinafter referred to as Railroad Co.) is a corporation duly organized under Illinois law on November 20, 1902. On September 30, 1903 the Railroad Co. entered into a lease with the South Side Elevated Railroad Company, a copy of which accompanies this stipulation and is marked S-10. Under date of March 1, 1905 the Railroad Co. issued $2,327,000. 4% First Mortgage Bonds due March 1, 1945 under a First Mortgage which accompanies this stipulation and is marked S-11.

A statement showing the income received for the years 1911 to 1933 inclusive of the Railroad Co. accompanies this stipulation and is marked S-12. Balance sheets of the Railroad Co. as of December 31 of each year from 1911 to 1933 accompany this stipulation and are marked S-13.

The Railroad Co. was at all times a wholly owned subsidiary of the New Jersey Co.

The deficit of the Railroad Co. as shown in Exhibit S-13 is according to the books as set forth in S-13. It is agreed that the following adjustments should be made in the deficit

account of the Railroad Co. as shown by its books, in order that said account may reflect a correct statement of its deficit under the applicable Revenue Acts.

The deficit account of the Railroad Co. as shown by its books as set forth in S-13, should be decreased by the following sums on the dates noted: December 31, 1930—$530,458.62; December 31, 1931—$558,209.86; December 31, 1932—$585,961.02 and December 31, 1933—$613,712.22. These decreases should be made to restore to surplus the depreciation charged off on the books of the Railroad Co. in excess of that allowed by the Bureau of Internal Revenue in the determination of its taxable income.

5. The Produce Terminal Corporation (hereinafter referred to as Produce Terminal Corp.) is a corporation duly organized under Illinois law on March 4, 1915. Prior to the formation of this company, the business which it had been formed to carry on was carried on by the Transit Co. From the date of its formation until 1921 this company was a wholly owned subsidiary of the Transit Co. In 1921 the Transit Co. distributed all the shares of the Produce Terminal Corp. to the New Jersey Co. as a dividend; and on December 31, 1926 the New Jersey Co. distributed said shares to the petitioner, the Chicago Stock Yards Company (hereinafter referred to as the Maine Co.), as a dividend. Since December 31, 1926 the Produce Terminal Corp. has been a wholly owned subsidiary of the Maine Co.

The capital stock of the Produce Terminal Corp. at the time of its incorporation was $1,000. consisting of 10 shares of a par value of $100. each. This authorized capital stock was increased as follows:

On November 16, 1915 to $200,000. consisting of 2,000 shares of a par value of $100. each

On January 29, 1919 to $250,000. consisting of 2,500 shares of a par value of $100. each

On September 20, 1919 to $300,000, consisting of 3,000 shares of a par value of $100. each

On November 12, 1921 to $500,000, consisting of 5,000 shares of a par value of $100. each

On June 3, 1927 to $2,000,000, consisting of 20,000 shares of a par value of $100. each

A statement showing the income received and the dividends paid for the years 1916 to 1933 inclusive accompanies this stipulation and is marked S-14. Balance sheets of the Produce Terminal Corp. as of December 31 of each year from 1916 to 1933 inclusive accompany this stipulation and are marked S-15.

The surplus of the Produce Terminal Corp. as shown in Exhibit S-15 is according to the books. It is agreed that the following adjustments should be made in the surplus account of the Produce Terminal Corp. as shown by its books, in order that said account may reflect a correct statement of earned surplus under the applicable Revenue Acts.

The surplus of the Produce Terminal Corp. as shown by its books as set forth in S-15, on December 31, 1930, 1931, 1932 and 1933 should be decreased by the sum of $370,865.47 representing a write-up of the value of capital assets in earlier years.

For each of said years the surplus on December 31 of the Produce Terminal Corp. as shown by its books as set forth in S-15, should be increased by the sum of $717,000. representing a stock dividend of said amount declared and paid in 1927 to the Maine Co.

6. The Chicago Junction Railways and Union Stock Yards Company (herein referred to as New Jersey Co.) is a Corporation duly organized under New Jersey law on July 10, 1890. A copy of its charter and all amendments to it accompany this stipulation marked S-16. Upon its forma

tion the New Jersey Co. acquired all of the capital stock of the Transit Co. with the exception of a few shares amounting to less than 2% thereof; and by the latter part of 1913 the New Jersey Co. owned all of the capital stock of the Transit Co.

(a) Under date of July 10, 1890 the New Jersey Co. issued $10,000,000. 5% Collateral Trust Gold Bonds due July 1, 1915 under a Deed of Trust which accompanies this stipulation and is marked S-17.

(b) On January 15, 1892 the New Jersey Co. entered into an Agreement with Philip D. Armour, Nelson Morris, Gustavus F. Swift and others, a copy of which accompanies this stipulation and is marked S-18. The amount required by this Agreement to be paid by the New Jersey Co. to the other contracting parties, namely, $3,000,000. in bonds, was paid by the issuance of the bonds referred to in the following paragraph (c) of this stipulation.

(c) Under date of June 15, 1892 the New Jersey Co. issued $3,000,000. 5% Non-Cumulative Income Bonds under a Trust Agreement of said date, a copy of which accompanies this stipulation and is marked S-19.

(d) On June 23, 1892 the New Jersey Co. entered into an Agreement with Henry Botsford and others, a copy of which accompanies this stipulation and is marked S-20. The amount required to be paid under this Agreement, namely, $100,000. in cash and $300,000. in bonds, was paid by the New Jersey Co. to the other contracting parties.

(e) Under date of January 24, 1898 the New Jersey Co. issued $400,000. 5% notes under a Collateral Trust Agreement of said date, a copy of which accompanies this stipulation and is marked S-21.

(f) On December 7, 1899 the New Jersey Co. entered into an Agreement with Schwarzschild & Sulzberger Company,

a copy of which accompanies this stipulation and is marked S-22. The amount required to be paid by the terms of this Agreement by the New Jersey Co., namely, $500,000. in cash, was paid by the New Jersey Co. to the other contracting party; and the New Jersey Co. paid to the other party $40,000. in cash in lieu of conveying to it the land referred to in the Agreement.

(g) On April 1, 1901 the New Jersey Co. entered into an Agreement with Anglo-American Provision Company upon terms similar to those contained in S-23 (hereinafter referred to) with the exception that the amount required to be paid and which was paid by the New Jersey Co. to the Anglo-American Provision Company in accordance with the Agreement was cash $200,000. and land worth $25,000. Neither the original nor any copy of this Agreement can be found.

(h) On November 9, 1901 the New Jersey Co. entered into an Agreement with The G. H. Hammond Company, a copy of which accompanies this stipulation and is marked S-23. The amount required by this Agreement to be paid by the New Jersey Co. to the other contracting party, namely, $500,000., was paid by the New Jersey Co. to the other contracting party.

(i) Under date of April 10, 1900 the New Jersey Co. executed a Mortgage and Deed of Trust authorizing an issue of $14,000,000. 4% Forty-Year Mortgage and Collateral Trust Bonds. $4,000,000. of said bonds were issued at that time. At that time $2,465,000. face value of the $3,000,000. bonds which had been issued by the New Jersey Co. on June 15, 1892 and the $400,000. notes issued January 24, 1898 were outstanding. $2,465,000. of the proceeds received from the issuance of said $4,000,000. face value of bonds of 1900 were used to retire said 1892 bonds; $400,000. of the proceeds to retire said $400,000. notes; and the remaining pro-

ceeds of the $4,000,000. were devoted to corporate purposes. The remaining $10,000,000. face value of bonds authorized were not then issued but were reserved to retire the $10,000,000. bonds issued July 10, 1890.

A copy of said Mortgage and Deed of Trust dated April 10, 1900 accompanies this stipulation and is marked S-24.

(j) Under date of April 1, 1915 the New Jersey Co. executed a Supplemental Mortgage and Deed of Trust, a copy of which accompanies this stipulation and is marked S-25. This supplemented the Mortgage and Deed of Trust of April 10, 1900. The $10,000,000. face value of bonds issued under the April 10, 1900 Mortgage and Deed of Trust and the April 1, 1915 Supplement were used to retire the $10,000,000. face value of bonds of this company issued on July 10, 1890.

(k) A statement showing the income received and dividends paid by the New Jersey Co. for the years 1911 to 1933 inclusive accompanies this stipulation and is marked S-26. Balance sheets of the New Jersey Co. as of December 31 of each year from 1911 to 1933 inclusive accompany this stipulation and are marked S-27.

The surplus of the New Jersey Co. as shown in S-27 is according to the books. It is agreed that the following adjustments should be made in the surplus of the New Jersey Co. as shown by its books, in order that said account may reflect a correct statement of earned surplus under the applicable Revenue Acts.

The surplus of the New Jersey Co. on December 31, 1930 as shown by its books as set forth in S-27 should be increased in the amount of $6,974,529.93 (of which $2,104,000. represents a write-down of value of capital stock of the Transit Co. in 1913; $2,036,427.84 represents bonds of the Indiana Harbor Belt Railroad Company not carried on the books of the New Jersey Co.; $2,436,462.84 represents in-

come upon the sale of real estate by the New Jersey Co. to C. M. D. for additional certificates of beneficial interest in the latter in 1916, which income was credited to premium reserve and so carried in S-27; $168,441.85 represents unamortized bond discount previously charged off the books of the New Jersey Co. and $229,197.40 represents a profit from the sale of land prior to 1911 which was credited through error into another account).

The surplus of the New Jersey Co. on December 31, 1930 as shown by its books as set forth in S-27 should be decreased by the amount of $5,121,204.50 (of which $1,821,204.50 represents a write-up of capital stock of the Transit Co. in 1904 and $3,300,000 represents a stock dividend received from the Railway Co. in 1913).

The surplus of the New Jersey Co. on December 31, 1931 as shown by its books as set forth in S-27 should be increased in the amount of $6,956,091.95 (including the items of $2,104,000.; $2,036,427.84; $229,197.40 and $2,436,462.84 previously referred to and also including an item of $150,003.87 representing unamortized bond discount previously charged off the books of the New Jersey Co.).

The surplus of the New Jersey Co. on December 31, 1931 as shown by its books as set forth in S-27 should be decreased by the amount of $5,121,204.50 (of which $1,821,204.50 represents a write-up of capital stock of the Transit Co. in 1904 and $3,300,000 represents a stock dividend received from the Railway Co. in 1913).

The surplus of the New Jersey Co. on December 31, 1932 as shown by its books as set forth in S-27 should be increased in the amount of $6,937,653.97 (including the items of $2,104,000.; $2,036,427.84; $229,197.40 and $2,436,462.84 referred to previously and also including an item of $131,565.89 representing unamortized bond discount previously charged off the books of the New Jersey Co.).

The surplus of the New Jersey Co. on December 31, 1932 as shown by its books as set forth in S-27 should be decreased by the amount of $5,121,204.50 (of which $1,821,204.50 represents a write-up of capital stock of the Transit Co. in 1904 and $3,300,000. represents a stock dividend received from the Railway Co. in 1913).

The surplus of the New Jersey Co. on December 31, 1933 as shown by its books as set forth in S-27 should be increased in the amount of $6,919,215.99 (including the items of $2,104,000.; $2,036,427.84; $229,197.40 and $2,436,462.84 previously referred to and also including an item of $113,127.91 representing unamortized bond discount previously charged off the books of the New Jersey Co.).

The surplus of the New Jersey Co. on December 31, 1933 as shown by its books as set forth in S-27 should be decreased in the amount of $5,121,204.50 (of which $1,821,204.50 represents a write-up of capital stock of the Transit Co. in 1904 and $3,300,000. represents a stock dividend received from the Railway Co. in 1913).

On the balance sheets of the New Jersey Co. which are S-27 attached to this stipulation, the following intercompany items existed in addition to those so identified on said balance sheets.

Balance Sheet as of December 31, 1929.

The item "Accounts Payable" includes $82,500. due to Transit Co. and the item "Notes Payable $300,000." represents a note due to the Transit Co.

Balance Sheet as of December 31, 1930.

The item "Accounts Payable" includes $97,500. due to Transit Co. and the item "Notes Payable $300,000." represents a note due to the Transit Co.

Balance Sheet as of December 31, 1931.

The item "Accounts Payable" includes $112,500. due to Transit Co. and the item "Notes Payable $300,000." represents a note due to the Transit Co.

Balance Sheet as of December 31, 1932.

The item "Accounts Payable" includes $127,500. due to Transit Co. and the item "Notes Payable $300,000." represents a note due to the Transit Co.

Balance Sheet as of December 31, 1933.

The item "Accounts Payable" includes $142,500. due to Transit Co. and the item "Notes Payable $300,000." represents a note due to the Transit Co.

(1) A statement showing the amount of dividends received by holders (other than the Maine Co.) of guaranteed common stock and of preferred stock of the New Jersey Co. for the years 1911 to 1933 accompanies this stipulation marked S-28.

At all times the authorized and issued capital stock of the New Jersey Co. consisted of 65,000 shares of preferred stock of a par value of $100. each and 65,000 shares of common stock of a par value of $100. each. The holder of each share of each class was entitled to one vote.

It is agreed that the Federal tax returns filed by the New Jersey Co. for any or all years prior to 1934 may be introduced in evidence.

7. Central Manufacturing District (hereinafter referred to as C. M. D.) is a real estate trust with transferrable shares. The trust was originally created by a transfer to Spoor and Winston, Trustees under a deed dated May 2, 1902, a copy of which is attached marked S-29. On that date it held title to real estate in Chicago adjacent to the Stock Yards. The form of organization was a trust

of which John A. Spoor and Frederick S. Winston were trustees and under which the New Jersey Co. was sole beneficiary. The trust received conveyances of additional land on March 1, 1907 and on February 1, 1908.

Under date of May 1, 1907 the New Jersey Co. issued $2,000,000. 5% bonds under a Mortgage and Deed of Trust, a copy of which Mortgage and Deed of Trust accompanies this stipulation and is marked S-30. The proceeds of these bonds were paid to C. M. D.

Under date of March 1, 1908 the New Jersey Co. issued $3,000,000. 5% bonds under a Mortgage and Deed of Trust, a copy of which Mortgage and Deed of Trust accompanies this stipulation and is marked S-31. A portion of the proceeds of said bonds was used to retire the bonds issued May 1, 1907; and the rest was paid to C. M. D.

On February 1, 1916 an Indenture and Declaration of Trust was executed, a copy of which Indenture and Declaration is attached marked S-32, which was in substitution for the terms of the original trust deed. The February 1, 1916 Indenture has five amendments marked S-32(A), S-32(B), S-32(C), S-32(D), and S-32(E) respectively. Under said Indenture and Declaration and said amendments, the New Jersey Co. was the sole owner of the shares of C. M. D.

Under date of February 25, 1916 an Indenture of Trust was executed, a copy of which accompanies this stipulation and is marked S-33.

$3,000,000. Series A 5% Bonds were immediately issued. A portion of the proceeds were used to retire all bonds issued on March 1, 1908 which were then outstanding. The Series A bonds matured $120,000. on March 1 of each year 1917 to 1941 inclusive. Further bonds were issued under said Indenture of Trust maturing as follows:

$1,000,000. Series B 5's dated March 1, 1916 maturing serially $40,000. each year from March 1, 1917 to 1941 inclusive.

$ 330,000. Series B 5's dated March 1, 1919 maturing serially $30,000. on March 1, 1931, $40,000. each year from March 1, 1932 to March 1, 1938 inclusive, and $20,000. on March 1, 1939.

$1,000,000. Series B 5½'s dated March 1, 1923 maturing serially $25,000. a year from March 1, 1924 to 1940 inclusive and $575,000. on March 1, 1941

$ 989,000. Series B 6's dated March 1, 1920 maturing serially $20,000. each year from March 1, 1921 to March 1, 1929 inclusive and $809,000. on March 1, 1930

A statement showing the income received and dividends paid by C. M. D. for the years 1911 to 1933 inclusive accompanies this stipulation and is marked S-34. Balance sheets of C. M. D. as of December 31 of each year from 1911 to 1933 inclusive accompany this stipulation and are marked S-35.

The surplus of C. M. D. as shown in S-35 is according to the books. It is agreed that the following adjustments should be made in the surplus account of the C. M. D. as shown by its books, in order that said account may reflect a correct statement of earned surplus under the applicable Revenue Acts.

The surplus account of C. M. D. as shown by its books as set forth in S-35 should be increased by the following sums on the dates noted: December 31, 1930—$179,166.60; December 31, 1931—$187,500.; December 31, 1932—$187,500. and December 31, 1933—$187,500. all representing a bond sinking fund reserve.

On the balance sheets of C. M. D. which are S-35 attached to this stipulation, the following intercompany items existed in addition to those so identified on the balance sheets.

Balance Sheet as of December 31, 1929.

The item "Accounts Payable" includes $19.68 due to Transit Co.

The item "Bonds" includes bonds of a par value as follows:

Held by the Maine Co.	$83,000.

Balance Sheet as of December 31, 1930.

The item "Notes Payable" includes $200,000. due to New Jersey Co.

The item "Accounts Payable" includes the following:

Due to New Jersey Co.	$ 3,788.89
Due to Transit Co.	54.73
Due to Maine Co.	800,000.00

The item "Bonds" includes bonds of a par value of $49,000. held by the Maine Co.

Balance Sheet as of December 31, 1931.

The item "Accounts and Notes Receivable" includes an account receivable of $29,113.04 due from Central Storage & Forwarding Corp.

The item "Notes Payable" includes $200,000. due to New Jersey Co.

The item "Accounts Payable" includes the following:

Due to New Jersey Co.	$ 3,788.89
Due to Transit Co.	112.99
Due to Maine Co.	800,000.00

The item "Bonds" includes bonds of a par value of $47,000. held by the Maine Co.

Balance Sheet as of December 31, 1932.

The item "Accounts and Notes Receivable" includes an account receivable of $74,540.13 due from Central Storage & Forwarding Corp.

The item "Notes Payable" includes $200,000. due to New Jersey Co.

The item "Accounts Payable" includes the following:

Due to New Jersey Co.	$ 3,788.89
Due to Transit Co.	177.22

There is also included partly in "Accounts Payable" and partly in "Notes Payable" a total of $1,350,000. due to the Maine Co.

The item "Bonds" includes bonds of a par value of $41,000. held by the Maine Co.

Balance Sheet as of December 31, 1933.

The item "Accounts and Notes Receivable" includes an account receivable of $11,167.98 due from Central Storage & Forwarding Corp.

The item "Notes Payable" includes the following:

Due to New Jersey Co.	$ 200,000.00
Due to Maine Co.	1,625,000.00

The item "Accounts Payable" includes the following:

Due to Transit Co.	$ 595.06
Due to New Jersey Co.	14,788.89

The item "Bonds" includes bonds of a par value of $31,000. held by the Maine Co.

8. C. M. D. became the owner of all the capital stock of the CENTRAL STORAGE CORPORATION, an Illinois corporation, on June 6, 1931 and on the same day became the owner of all the capital stock of CENTRAL STORAGE AND FORWARDING CORPORATION, an Illinois corporation. On December 31, 1931 the Central Storage Corporation was merged into the Central Storage and Forwarding Corporation; and at all times after June 6, 1931 the C. M. D. has been the sole owner of all the capital stock of the Central Storage and Forwarding Corporation.

Statements showing the income received for the period from June 6, 1931 to December 31, 1931 by the Central Storage Corporation and for the period from June 6, 1931 to

December 31, 1933 inclusive by the Central Storage and Forwarding Corporation accompany this stipulation marked S-36. Balance sheets as of December 31, 1931 of the Central Storage Corporation and as of December 31 of each year from 1931 to 1933 inclusive of the Central Storage and Forwarding Corporation accompany this stipulation marked S-37.

CENTRAL STORAGE

Balance Sheet as of December 31, 1931.

The item "Accounts Payable" includes $2,353.89 due to Central Storage & Forwarding Corp.

CENTRAL STORAGE & FORWARDING CORP.

Balance Sheet as of December 31, 1931.

The item "Accounts and Notes Receivable" includes an account receivable of $2,353.89 due from Central Storage.

The item "Accounts Payable" includes $29,113.04 due to C. M. D.

Balance Sheet as of December 31, 1932.

The item "Accounts Payable" includes the following:

Due to Transit Co.	$ 58.80
Due to C. M. D.	74,540.13

Balance Sheet as of December 31, 1933.

The item "Accounts Payable" includes the following:

Due to Transit Co.	$ 78.58
Due to C. M. D.	11,167.98

9. The petitioner, CHICAGO STOCK YARDS COMPANY (hereinafter referred to as the Maine Co.) is a corporation duly organized under Maine Law on September 26, 1911. A copy of its charter with the only amendment thereto filed November 11, 1911 accompanies this stipulation and is marked S-38. This corporation was formed in pursuance of a Plan dated June

30, 1911, a copy of which with forms of assents thereto accompanies this stipulation and is marked S-39.

On September 27, 1911 the Maine Co. entered into an agreement with Frank R. Pegram, a copy of which accompanies this stipulation and is marked S-40. On the same day the Maine Co. entered into an agreement with the Old Colony Trust Company, a copy of which accompanies this stipulation and is marked S-41.

The following journal and cash book entries were made on the books of the Maine Co. at the time of the original issuance of the stock with a par value of $1,000,000.

Date—September 27, 1911
Journal 1, Page 1
Debit F. R. Pegram $1,000,000.
Credit Capital Stock $1,000,000.
Explanation: 10,000 shares at $100. in part payment of benefits acquired under Agreement of September 27, 1911 in accordance with vote of directors that date.

Date—September 27, 1911
Cash Book 1, Page 1
Debit Cash $1,000,000.
Credit F. R. Pegram $1,000,000.
Explanation: In accordance with the provisions of an Agreement dated September 27, 1911—$1,000,000.

On October 2, 1911, an Indenture of Trust was executed by the Maine Co., a copy of which accompanies this stipulation marked S-42.

Prior to 1914 all of the common stockholders of the New Jersey Co. (with the exception of the holder of 3 shares) had, as set forth in S-43 accompanying this stipulation and in accordance with the Plan, either deposited their stock to be stamped with the guaranty provided for in the Plan or exchanged their stock for the 5% bonds of the Maine Co. issued under said Indenture of October 2, 1911. Common stockholders of the New Jersey Co. who had deposited their stock to be stamped with the guaranty provided for in the

Plan received common stock certificates with the guaranty endorsed thereon. A specimen of such common stock certificate of the New Jersey Co. accompanies this stipulation marked S-44. A specimen preferred stock certificate of the New Jersey Co. accompanies this stipulation marked S-45. The holder of 3 shares of common stock of New Jersey Co. neither deposited his stock to be stamped nor exchanged it for bonds prior to July 1919; but at that time the 3 shares of such stockholder were acquired by the Maine Co.

On October 1, 1914 the Maine Co. and the New Jersey Co. entered into an agreement, a copy of which accompanies this stipulation and is marked S-46.

Minutes of a meeting of the Executive Committee of the New Jersey Co. held on December 4, 1914 relating to said agreement accompany this stipulation marked S-47.

Minutes of a meeting of the Stockholders of the New Jersey Co. held on February 9, 1915 relating to said agreement accompany this stipulation marked S-48.

On October 15, 1921 the Maine Co. issued $1,500,000. face value Ten-Year 7% Serial Debentures under an Indenture, a copy of which accompanies this stipulation and is marked S-49. These bonds were issued to F. H. Prince & Co. in partial payment at par of a debt then owed by the Maine Co. to F. H. Prince & Co. Under date of June 1, 1922 the Maine Co. issued $2,000,000. face value Ten-Year 7% bonds under an Indenture, a copy of which accompanies this stipulation and is marked S-50. $1,500,000. face value of the issue of June 1, 1922 was used to retire the issue of October 15, 1921 and the remaining $500,000. was issued to F. H. Prince & Co. in partial payment at par of a debt then owed by the Maine Co. to F. H. Prince & Co. Said $2,000,000. face value of bonds dated June 1, 1922 were reacquired by the company for $1,860,000. in December 1922.

A statement showing the income received and dividends

paid by the Maine Co. for the years 1911 to 1933 inclusive accompanies this stipulation and is marked S-51. Balance sheets of the Maine Co. as of December 31 of each year from 1911 to 1933 inclusive accompany this stipulation and are marked S-52.

The surplus of the Maine Co. as shown in S-52 is according to the books. It is agreed that the following adjustments should be made in surplus account of the Maine Co. as shown by its books in order that said account may reflect a correct statement of earned surplus under the applicable Revenue Acts.

The surplus of the Maine Co. on December 31, 1930, 1931, 1932 and 1933 as shown by its books as set forth in S-52 should be increased by $7,000,000. representing the amount charged to surplus in conformity with the journal entry of the Maine Co., a copy of which is attached to this stipulation and marked S-53.

For each of said years the surplus on December 31 of the Maine Co. as shown by its books as set forth in S-52 should be increased by $2,228,080. representing a reserve for liability as guarantor charged to surplus in 1924 in conformity with the journal entry of Maine Co., a copy of which is attached to this stipulation marked S-53.

On December 31, 1933 the surplus of the Maine Co. as shown by its books as set forth in S-52 should be increased by $2,235,114.28 representing a reserve for shrinkage in investments charged to surplus on its books in the year 1933.

The surplus of Maine Co. on December 31, 1930, 1931, 1932 and 1933 as shown by its books as set forth in S-52 should be increased by $533,340.66 representing an understatement of value of stock of Produce Terminal Corporation received as a dividend in 1926.

On November 11, 1911 the authorized and issued capital stock of the Maine Co. was increased from $1,000,000. to

$8,000,000. A journal entry made upon the books at the time of such entries accompanies this stipulation and is marked S-54. The capital stock of the Maine Co. on November 11, 1911 was divided into 80,000 shares of common stock with a par value of $100. which were owned as follows:

From November 11, 1911 to June 1922, F. H. Prince was to all intents and purposes the actual owner of 64,480 shares and J. Ogden Armour or Armour & Company was to all intents and purposes the actual owner of 15,520 shares.

The holdings of F. H. Prince were brought to 80,000 shares in June of 1922 when he acquired the 15,520 shares of Maine Co. stock previously owned by J. Ogden Armour or Armour & Company.

From June 1922 to June 3, 1932, 80,000 shares were owned by F. H. Prince. After June 3, 1932, 48,000 shares were owned by F. H. Prince & Co., Inc., a Maine corporation, and 32,000 shares were owned by F. H. Prince. Nothing contained in this paragraph shall prejudice the right of the respondent to contend that the corporate entity of F. H. Prince & Co., Inc., should be disregarded.

At the time when F. H. Prince acquired the 15,520 shares of Maine Co. stock from J. Ogden Armour or Armour & Company, J. Ogden Armour or Armour & Company received the following:

(a) From F. H. Prince, $300,000. in cash and $2,000,000. in bonds of the Maine Co. issued under the Indenture attached hereto marked S-50, which bonds F. H. Prince received from F. H. Prince & Company. Said bonds were reacquired by the Maine Co. from J. Ogden Armour or Armour & Company in December of that year for $1,860,000.

(b) In 1921 Central Manufacturing District, Company was organized under the laws of the State of Delaware

with an authorized capital stock of $800,000. consisting of 8,000 shares of a par value of $100. Under an agreement between the Maine Co. and Central Manufacturing District Company dated May 11, 1922 and an agreement between F. H. Prince, Armour & Company and the Maine Co. dated June 2, 1922 (which agreements are attached hereto marked respectively S-55 and S-56), 6,448 shares of Central Manufacturing District Company were issued to the Maine Co. and 1,552 shares to Armour & Company.

A copy of the plan referred to in S-56 is hereto attached marked S-57.

Said plan was prepared in accordance with the requirements of a decree in the Supreme Court for the District of Columbia in the case of the United States of America v. Swift & Company et als, Docket No. 37623, dated February 27, 1920, a copy of which decree it is agreed may be admitted in evidence.

From 1911 to 1917 Mr. Prince held no position in the Maine Co. On December 13, 1918 he was elected a Director, Vice President and Secretary and served in these positions until October 19, 1921 on which date he resigned as Vice President and Secretary and was elected President. He served as President and Director of this company from October 19, 1921 to the present date.

10. F. H. Prince & Co., Inc. was organized under the laws of Maine on June 1, 1932 with a capital stock authorized of 20,000 shares par value $100. each. On June 1, 1932 F. H. Prince & Co., Inc. exchanged its entire capital stock of 20,000 shares for 48,000 shares of the common stock of the Maine Co. owned by F. H. Prince, F. H. Prince thus receiving the entire capital stock of F. H. Prince & Co., Inc.

11. On June 3, 1932 F. H. Prince transferred and delivered to Trustees under the Deed of Trust dated June 3, 1932, a copy of which accompanies this stipulation marked S-58, the 20,000 shares which he held in F. H. Prince & Co., Inc. Since June 3, 1932 F. H. Prince has owned no stock in F. H. Prince & Co., Inc.

The officers of F. H. Prince & Co., Inc. from June 3, 1932 to December 19, 1932 were as follows:

Brooks Whitehouse, President
John F. Dana, Vice President
Robinson Verrill, Treasurer
John F. Dana, Clerk
John F. Dana, Director
Robinson Verrill, Director
Brooks Whitehouse, Director

From December 19, 1932 to December 31, 1933 the following individuals were officers and directors of F. H. Prince & Co., Inc.:

Frederick H. Prince, President
Frederick H. Prince, Jr., Vice President
James A. McDonough, Treasurer
James A. McDonough, Secretary
John F. Dana, Clerk
Frederick H. Prince, Director
Frederick H. Prince, Jr., Director
Abbie Norman Prince, Director
James A. McDonough, Director
Frank R. Pegram, Director

At all times subsequent to June 3, 1932 the sole stockholders of F. H. Prince & Co., Inc. were the Trustees under the Deed of Trust dated June 3, 1932.

12. There is attached to this stipulation as S-59 a schedule of purchases of New Jersey Co. common stock by the Maine Co.

There is attached to this stipulation as S-60 a schedule of

purchases of New Jersey Co. preferred stock by the Maine Co.

There is attached to this stipulation as S-61 a schedule of bonds issued by the Maine Co. in exchange for New Jersey Co. common.

There is attached to this stipulation as S-62 a schedule of bonds of the Maine Co. reacquired and held in its treasury.

13. The PAU CORPORATION is a corporation duly organized under Illinois law on October 29, 1931. The capital stock of the Pau Corporation consisting of $5,000. was subscribed for in cash by F. H. Prince & Co. The Pau Corporation with money which was loaned to it by the Maine Co. purchased machinery to be used by the Produce Terminal Corp. which machinery as purchased was immediately installed in the plant of the Produce Terminal Corp.

The Maine Co.'s advances to the Pau Corporation for the purpose of purchasing such machinery began in 1932 and amounted to $189,503.34 at the end of that year and amounted on December 31, 1933 to $236,536.51. No interest was paid to the Maine Co. by the Pau Corporation on such advances.

A statement showing the income received by the Pau Corporation for the years 1932 and 1933 accompanies this stipulation and is marked S-63. Balance sheets of the Pau Corporation as of December 31, 1932 and 1933 accompany this stipulation marked S-64.

14. WESTERN ASSOCIATES, INC. is a corporation duly organized under Delaware law in 1933. In January of 1933 it issued 40,000 shares of stock for which the Maine Co. paid $1,500,000. in cash. The Maine Co. has at all times been the

sole owner of all the capital stock of this company. Western Associates, Inc. immediately paid the $1,500,000. for 40,000 shares of the capital stock of Stock Yards Bank & Trust Company, a bank organized under the laws of the State of Illinois and located in the Stock Yards district of Chicago.

In April of 1933 said Stock Yards Bank & Trust Company was reorganized and Western Associates, Inc. received in exchange for the 40,000 shares of the capital stock of the Stock Yards Bank & Trust Company previously held by it 40,000 shares of the capital stock of the Live Stock National Bank of Chicago, which did business in the banking house formerly occupied by Stock Yards Bank & Trust Company. Western Associates, Inc. has owned said shares since that time.

Western Associates, Inc. was formed as a corporation through which the Maine Co. might subscribe to and hold the 40,000 shares of Stock Yards Bank & Trust Company and later of the Live Stock National Bank of Chicago.

Western Associates, Inc. received no income and had no expenses prior to December 31, 1933.

15. At all material times F. H. Prince was the sole owner and proprietor of F. H. Prince & Co., a firm engaged in the brokerage and banking business and holding seats on the New York, Boston and Chicago Stock Exchanges.

16. Schedules S-65, S-66 and S-67 showing for the period from December 31, 1911 through December 31, 1933 cash loans and advances from the Maine Co. to F. H. Prince and F. H. Prince & Co. and from F. H. Prince & Co. to the Maine Co.; and loans of securities from the Maine Co. to F. H. Prince and F. H. Prince & Co. accompany this stipulation. A schedule of interest paid from 1923 to 1933 inclusive

by F. H. Prince and F. H. Prince & Co. to the Maine Co. on indebtedness at the rate of 4% per annum accompanies this stipulation marked S-68. A schedule of interest paid by the Maine Co. to F. H. Prince & Co. on indebtedness from 1923 to 1933 inclusive accompanies this stipulation marked S-69; the rate at which such interest was charged was 5½% during the years 1923 and 1924 and 5% during the years 1925, 1926 and 1927.

17. In its tax return filed for the year 1930 the petitioner claimed a deduction from its gross income in the amount of $499,973.08, representing a loss claimed upon the sale in that year of 1,552 shares of capital stock of the Central Manufacturing District Company, a Delaware corporation. This deduction was disallowed by the Commissioner. (See Paragraphs (4)(e) and (5)(C) of the original petition filed in this case). It is agreed that said deduction shall be disallowed.

18. In its tax return filed for the year 1932 the petitioner claimed a deduction from its gross income in the amount of $221,202.03, representing a loss claimed upon the sale in that year to F. H. Prince & Co., Inc. of 3,050 shares of capital stock of Stock Yards National Bank and 240 shares of capital stock of Central Manufacturing District Bank. This deduction was disallowed by the Commissioner. (See Paragraphs (4)(f) and (5)(D) of the original petition filed in this case). It is agreed that said deduction shall be allowed.

19. It is agreed that the petitioner is entitled to a deduction from gross income of 1932 (not claimed by it in its return for the year 1932) in the amount of $24,000., representing an assessment in that year by the banking authorities of the State of Illinois against and upon 240 shares of

the capital stock of the Central Manufacturing District Bank owned by the petitioner and which assessment the petitioner paid. (See Paragraphs (4)(g) and (5)(E) of the original petition filed in this case.)

20. The stockholders of the Maine Co. did not report any of the undistributed earnings of said company in the years 1930, 1932 and 1933 under the provisions of Sec. 104(d) of the Revenue Acts of 1928 and 1932.

21. It is agreed that the income tax returns of F. H. Prince from 1917 to 1933, inclusive, and F. H. Prince & Co., Inc. for the years 1932 and 1933 may be introduced in evidence.

EDWARD J. KEELAN, JR.,
Counsel for Petitioner.

J. P. WENCHEL,
Counsel for Respondent.

[Title omitted.]

REPORTER'S MINUTES.

[Filed Jan. 31, 1939.]

Hearing at Washington, D. C., on the 30th day of January, 1939, at 9:45 o'clock a. m.

The above-entitled proceeding came on for hearing on this the 30th day of January, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had and testimony heard, to wit:

Appearances:

JOSEPH N. WELCH, Esq., EDWARD J. KEELAN, Esq., LAWRENCE E. GREEN, Esq. (Hale & Dorr, 60 State Street, Boston, Mass.)

JOSEPH K. MOYER, Esq. (1343 H Street, N. W., Washington, D. C.), and

FRANCIS B. KEENEY, Esq. (Swan, Keeney & Smith, 1310 Turks Head Building, Providence, R. I.), appearing on behalf of the Petitioner.

STANLEY B. PIERSON, Esq., and PHILIP M. CLARK, Esq. (HONORABLE J. P. WENCHEL, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

PROCEEDINGS.

The Member: State your appearances, please.

Mr. Welch: For the Petitioner, Mr. J. M. Welch will try. Mr. Lawrence E. Green will be with me, and Mr. Francis B. Keeney, the General Counsel of the Petitioner will

be with me. There are other appearances that we have given to the Clerks in the case.

The Member: But they are not present in the case?

Mr. Welch: They are present. Mr. Edward J. Keelan, also of Boston, will assist, and Mr. Joseph Moyer, of Washington, D. C.

The Member: That is the entire complement of counsel?

Mr. Welch: It is, if Your Honor please.

The Member: And for the Respondent?

Mr. Clark: Philip M. Clark, S. B. Pierson, and A. D. King. Your Honor, we have still a few matters to be ironed out in the way of stipulation. We have been working for a long while on that, and we are not quite finished as yet. May we have an hour or an hour and a half for that?

The Member: How long are you expecting this trial to last, Mr. Welch?

Mr. Welch: It is not easy to say, if Your Honor please. I should think quite clearly a week and might well run into more. I know what Mr. Clark has in mind, and my own feeling would be that we might as well start, if Mr. Clark is willing, and we have never had the slightest difficulty about stipulation. I think something has been left out between one draft and another, and my thought would be to proceed and amend the stipulation as we go along.

Mr. Clark: I think we ought to do that. That would clear the decks at the very beginning.

The Member: Mr. Welch suggests going right ahead now. I would prefer if the case could be begun and I could get your opening statements so that I could have the case in mind. I think, as a matter of fact, very frequently the mere making of opening statements sometimes clears the atmosphere for the perfection of a stipulation, and I would prefer, therefore, if you would make as full opening statements as you can.

Mr. Clark: It is perfectly agreeable with me.

Mr. Welch: Yes.

The Member: Very well. You may proceed, Mr. Welch. I don't want to discourage the complete stipulation of all facts that you gentlemen are ready to agree upon, but I want to go ahead as rapidly as possible.

Mr. Welch: A gigantic stipulation is already agreed upon, and there will be a very trifling amendment to it. Mr. Clark, may I ask if you can see this chart? It is an outline of the different companies which I think will help us in trying the case.

Mr. Clark: Yes, I can see it.

Mr. Welch: I take it, Your Honor sees it readily?

The Member: I can just see the forms but I can see none of the type except the top line. Let's not borrow trouble. I think perhaps I can get along all right.

Mr. Welch: If Your Honor please, there is a duplicate on a smaller scale of the chart that is here which may be easier for you to follow.

The Member: All right, sir.

STATEMENT OF CASE ON BEHALF OF PETITIONER.

Mr. Welch: If Your Honor please, this case that we are starting on is one of the now familiar 104 cases, the question as to whether or not a corporation has been formed or availed of for the purpose of avoiding the imposition of surtax upon shareholders.

When the case began, it had one or two other little issues in it of relatively trifling importance, and those have been disposed of in the stipulation that will be offered to Your Honor, so that we come down to the single 104 question in this case.

As was said to Your Honor, there is a stipulation which is at the moment signed, which I had intended to offer now.

but obviously it is going to have slight amendments to it. It is a bulky document, almost discouragingly so. Its bulk is due to what I think is rare good will on the part of counsel on both sides. I should like to say on behalf of Mr. Clark and Mr. Pierson, that whatever we wished in the stipulation as true went in readily, and I should like to think and hope that we were equally fair on our side, and I wouldn't want to pass the stipulation without saying a word about Mr. A. D. King of the technical staff, who also has a fine regard for anything that is true whether it helps his case or hurts it. And so, in this bulky stipulation, you will find a whole variety of documents and facts agreed upon. Not every one of those papers and documents will be referred to by the Petitioner, and I somewhat doubt if Your Honor's eye or the eye of any Member of the Board will actually light on everything in it, but certainly I think it is fair to say that no material fact that could readily go into a stipulation is missing.

The years in question are the years 1930, 1932, and 1933. No tax was assessed for the year 1931. It involves, as Your Honor knows from the name of the case, the Chicago Stock Yards. Certainly, when counsel began to work on it, it was a case of great complexity. It is my hope that those of us at this table will have succeeded in reducing it at least to manageable proportions, and in this opening it is my hope that I can make clear to Your Honor in a moderately simple way just what the case is and what it is about.

For that purpose, we have prepared and have in the courtroom this chart of which Your Honor has a smaller copy before you, and from that I think I can make the line-up of the several companies perhaps much clearer than I could do so without the chart.

At the top of the chart, in the center of it, is "The Stock Yards Company." That is the Petitioner in this case. That

company is the taxpayer. Throughout the case it will be constantly referred to as the Maine company, M-a-i-n-e and not m-a-i-n, and that word is used naturally because that is the State of its incorporation. It was incorporated in 1911. It had at all times material to this case 80,000 shares of stock outstanding, and it had bonds outstanding to the extent of $2,620,000, that being true as at the end of 1933. The amounts of bonds varies somewhat throughout the case.

In the year 1930, Frederick H. Prince owned all of the capital stock of that company. In 1932, 60 percent of the stock of that company was transferred to a corporation, and the shares in that corporation, in turn, placed in trust by Mr. Frederick H. Prince. In earlier years, between 1911 and 1922, a Mr. Armour of Chicago owned, roughly, 20 per cent of the shares of the stock in the Maine Company. That company is the top company of what for lack of a better name we have called the Chicago Stock Yards Enterprise. It dominates the other companies; it fixes their policies; it tells them what to do; and that is the taxpayer in the case.

Directly below the Chicago Stock Yards Company, in the center of the chart, in a large box, appears the Chicago Junction Railways, and Union Stock Yards Company. That is a New Jersey corporation. It was formed in 1890. It has a capital structure of preferred stock of the par value of $6,500,000, of which a small number, 2362 shares, are owned by the Maine company. It has a precisely identical issue of common, 65,000 shares, a capital structure of $6,500,000 at par value, of which as of the end of the period in question, 60,336 shares were owned by the Maine company. It has bonds outstanding of $14,000,000 which are due in 1940. It has guaranteed bonds of two subsidiary companies which I shall mention presently, one in the sum of $2,327,000 and one in the sum of $2,250,000. The stock, both common and preferred, has precisely equal voting powers. The pre-

ferred always has had full voting rights equal to the common.

This company about which I have been talking, as I think I said, was formed in 1890, and from 1894 it was the connecting—not 1894, but 1911, when the Maine company was formed. This company which we will constantly call the Jersey company, for that is the State of its incorporation, was the connecting link between the taxpayer at the top and the operating companies which appear at the third level of the chart.

I now take up those operating companies as they appear here. On the left of the chart, in the third level, is the Union Stock Yards & Transit Company of Chicago. That will constantly be referred to as the Transit Company. That company is the oldest company in the group. It was formed in 1865 by special act of the Illinois Legislature. At all times material to this case they had a capital stock structure of $13,200,000 par value, meaning, of course, 132,000 shares, and they were wholly owned by the New Jersey Company, the connecting link, as I have said, between the taxpayer and the operating companies.

Next at the third level is the Chicago Junction Railway Company. Mr. Green reminds me that I should say to Your Honor that the Transit Company, so-called, is the company that operates the Great Chicago Stock Yards, where stock comes in and is unloaded and fed and sold and delivered to purchasers, chiefly the packers, whose plants are nearby.

The Chicago Junction Railway Company appears next on this third level. That also is an Illinois corporation. It has a capital structure of 55,000 shares of stock and those again are wholly owned by the New Jersey Company, the connecting link with the Maine Company. That company is, for practical purposes, the owner of the Railway Company which serves the Chicago stockyards. The railway is, how-

ever, leased to the New York Central system and is actually operated by the New York Central.

Next on the third level is a company—

The Member: The New York Central is the lessee of properties from this Illinois Corporation, is it?

Mr. Welch: That is—

The Member: And the shares of the Illinois corporation are, in turn, to a large extent owned by the New Jersey corporation above it; is that correct?

Mr. Welch: Wholly owned.

The Member: Wholly owned?

Mr. Welch: Wholly owned. The next company on this same level is the Chicago Junction Railroad Company. Perhaps I should have said that we will constantly refer to the Chicago Junction Railway Company as the Railway Company and we shall refer throughout the case to the Chicago Junction Railroad Company as the Railroad Company.

Now, I confess that that is a slight distinction, and I had my difficulties with it myself, but if Your Honor will remember that the Railway Company is the steam railway, the big network of rails that feeds the stock yards, and that the Railroad Company is only a little passenger elevated line with a loop around the stock yards, and which, incidentally, doesn't loom very large in this case, I think the confusion that once existed in my mind about it will never exist in Your Honor's mind.

This Railroad Company is again an Illinois corporation. It was organized in 1903. It has a capital structure of 500 shares. It is wholly owned again by the New Jersey Company, this connecting link of which I have spoken, and it has a bond issue outstanding of $2,327,000, which is guaranteed, both the principal and interest, by the New Jersey Company. The furthest—

The Member: Now, just before you get off that, does it operate its own railroad?

Mr. Welch: I am glad to be reminded. It does not. The Railroad as soon as it was built was leased to the Chicago South Side Elevated Railway Company—Railroad Company of Chicago, and was operated by them until it went into receivership and, indeed, is now operated by the receiver.

The Member: Is that connected with the Chicago Elevated Railways, that is, the Loop Railroad? Or is it operated entirely separate?

Mr. Welch: I am under the impression that the South Side Elevated in Chicago is a separate company from the one that operates the Loop. Your Honor is perhaps more—

The Member: It doesn't come up into the main part of Chicago, then, at all?

Mr. Welch: I think it connects with it. It is not unlikely that Your Honor knows more about it than I do.

The Member: I think I know nothing about it from the standpoint of incorporate operation, and I wanted to find out whether it is wholly disassociated from the general elevated railways of Chicago or whether it is a part of that general Chicago elevated railway set-up.

Mr. Welch: Certainly it is a part of the general Chicago elevated railway set-up, but whether or not there is a separate company here and there is something that I think is not material to the case, and I don't actually know.

The Member: Very well.

Mr. Welch: As you move furthest to the right on this third level, you come to the Central Manufacturing District. That will be constantly referred to—

The Member: At all events, the Chicago Junction Railroad Company is not itself an operating company?

Mr. Welch: It is not.

The Member: But from the standpoint of its operations, it is only a lessor?

Mr. Welch: That is correct.

The Member: From the standpoint of intercorporate relations, its shares are entirely owned by the New Jersey Company?

Mr. Welch: Correct.

The Member: That is correct, isn't it?

Mr. Welch: That is right.

The Member: So it stands between those two more or less as a figure?

Mr. Welch: That is entirely correct.

The Member: Yes.

Mr. Welch: I now pass on to the last company on the right of this third level, which is the Central Manufacturing District, and which we will constantly refer to throughout the case as C. M. D., using just the initials. That concern is not a corporation. It is a trust in the Massachusetts form of real estate trust. All its shares are owned by the Jersey Company, and for purposes of this case it is entirely equal to a corporation. The Central Manufacturing District owns real estate to the north and to the northwest of the stock yards itself, and soon we shall have a map in the courtroom which will make all of that quite clear to Your Honor. Its capital set-up is to the extent of $4,098,000, and, as I said, it is represented by certificates of ownership wholly owned by the New Jersey Company. It has bonds outstanding of $2,250,000. This concern owns vacant land, develops it, and sells the land generally with a building built by the C. M. D. on the land to customers, also generally over long terms. Its only purpose was to develop tonnages for the Railway Company and thus make the Railway Company more valuable as a mover of freight. I should have said, Your Honor, that the bonds of the Cen-

tral Manufacturing District to the extent of $2,250,000 again are guaranteed by the Jersey Company.

Now, just below the Central Manufacturing District on the chart is something of trivial importance, but it goes there to make up the family tree. That is the Central Storage & Forwarding Company.

The Member: Now, as to the Central Manufacturing District, do I understand that its sole function is to acquire and dispose of real estate for the purpose of improving or acting as an industrial feeder to the railroad?

Mr. Welch: I should say disposes of. Its acquisitions have been fixed for a long period of time.

The Member: It is not engaged in acquiring any more?

Mr. Welch: No, for practical purposes it is not. It has this big tract, and for years it has been developing it and disposing of it either by lease or by sale on long-term contracts; and, as I said, always with an eye to a purchaser who would have freight moving in and out and thus developing tonnages for the Railway Company.

The Member: And that is all it does?

Mr. Welch: That is all it does.

I was speaking of this little subsidiary below the Central Manufacturing District, the Central Storage & Forwarding Company, a small company with a capital stock of $250,000. It is wholly owned by C. M. D., and its business is as its name would indicate, and I think it is of relatively trifling importance in this case.

We move clear to the left of the chart, at the lowest level, and we find a little company called "The Stock Yards Harness & Saddlery Company." That is a little company that sells harness and saddles to customers about the yards. It is a small company with a capital stock of $10,000, 100 shares, and it is wholly owned by the Transit Company. It

is a little business, but we have to put it in to fill out the whole family tree.

Now, I move back to the second level of the chart again, where, on the left of the chart, is the Produce Terminal Corporation. That is an Illinois Corporation, and we will refer to it constantly as Produce Terminal. It has a capital structure of $2,000,000, par value of 20,000 shares, and they are wholly owned by the Maine Company. This Produce Terminal Corporation manufactures heat, light, power, and water. If "manufactures" is not the word, it, at least, delivers those services to the stock yards and to some extent to packing town, which are the packers adjoining it, and to these industries that have grown up in C. M. D. It began as an operation of the Transit Company, which runs the stock yards, and became a tidy little utility, so that in the end, the Commerce Commission in Illinois insisted that it should be separately incorporated so that it might be regulated, and that was done in 1915.

As I have said, it is wholly owned by the Maine Company.

On this same level, over on the right, is a curious little corporation of small interest, I think, to any of us, called the Pan Corporation. It was incorporated in 1931, and has a capital structure of only $5,000; and its 50 shares are owned entirely by the Maine Company. That Company owns easements for the power lines of the Produce Terminal which runs around this area. It may seem like an odd little company, but the reason for its incorporation was that as the C. M. D. would make conveyances of property, quite a hodgepodge grew up as to easements. Sometimes they would get conveyed and sometimes they wouldn't, so it was thought desirable to get all those easements into this little corporation where they could be dealt with in a unified way. As I have said, it is a somewhat curious little company, and I doubt if Mr. Clark has much more interest in it than I do.

Furthest of all to the right is something that is of more importance. These two companies are dependent one on the other, and I will speak of the bottom one first, that is, the Livestock National Bank of Chicago. It was incorporated in 1933, and it has a capital stock of a million dollars.

The Member: 1933?

Mr. Welch: 1933. That is right, Your Honor.

The Member: The last year of those that are in issue?

Mr. Welch: That is right. It is a consequence of the bank crisis in Chicago, and that is why its incorporation is so late. It has 50,000 shares of stock outstanding, of which 40,000 are owned by Western Associates, Inc., which appears just above in the chart, and Western Associates, Inc., in turn, a Delaware corporation, is owned entirely by the Maine Company. The only purpose of the Western Associates, Inc., is that it should be a vehicle to hold the stock of the Livestock National Bank of Chicago.

Now, this Livestock National Bank of Chicago is something that emerged after a collapse of two banks of the Chicago Stock Yards. It will appear in evidence that the Maine Company together with its subsidiaries came to the rescue of those banks because of their intimate connection with the stock yards industry, in 1930 and 1932, and as a result of that rescue, the Livestock National Bank was formed, and the little Delaware company to hold its stock was formed, but the thing traces through to ownership by the Maine Company.

The Member: Didn't you say that the Delaware Company owns 40,000 of the 50,000?

Mr. Welch: Of the 50,000. There are 10,000 owned by the public, former stockholders of the defunct banks, who were given an opportunity to come into the new bank, and a few of them did to the extent that I have indicated.

The Member: But their identity is of no consequence?

Mr. Welch: None whatever. Now this which I have called the family tree of the enterprise—

The Member: You don't mind my interrupting you?

Mr. Welch: Not at all. I enjoy it, Your Honor.

The Member: This Livestock Bank, has it any functions in this organization? You say it was organized for the purpose of rescuing some existing firms from financial difficulty. That may explain its organization, but what is its present or what, during the taxable years, was its functional relation to this enterprise?

Mr. Welch: Well, its functional relation was this, if Your Honor please. The old bank that collapsed had been there since the Civil War days. It had come to be looked on by the public as an integral part of the stock yards.

The Member: What bank was it?

Mr. Welch: The Stock Yards National Bank was its name prior to this difficulty. It is of importance in this case for this reason: It was felt by the management of the Maine Company that if a bank at the stock yards failed and the word went out through the country that the stock yards bank had failed, it would give a fearful black eye to this whole enterprise, and so perfectly startling sums of money were put into the Livestock National Bank to save it and reorganize it in 1933.

The Member: Well, at that time was that bank independently owned?

Mr. Welch: It was.

The Member: And operated?

Mr. Welch: It was.

The Member: Yes.

Mr. Welch: And the sole reason for the enterprise coming to its rescue was that it was identified in the public mind with the stock yards, and now the enterprise can look with some pride and comfort at a perfectly sound bank that is

there at this moment, as the evidence will show. It is a bank which is constantly used by the shippers of livestock to the market, by the banks that the former deals with in the western States, and is used also by the commission men who buy stock at the stock yards, and is now an integral part of the whole enterprise, and one in which the management takes a certain amount of pride, although I will say to Your Honor that there was a good deal of pain prior to the pride when the money had to go in.

The Member: Its function is not restricted, however, to the enterprise, I take it? It provides the same banking facilities that had been provided to the entire territory, the entire business community that had been provided by the earlier banking corporations? I am trying to ascertain or get in my mind whether there is any peculiar business or functional relationship between the bank and these enterprises other than a mere ownership of stock.

Mr. Welch: Well, I think the answer is a little of both. Of course it is a perfectly public bank. It would be glad to take Your Honor's deposit or mine, and will deal as any bank will deal. On the other hand, it is now a depository of funds of the operating companies and the real secret of it is that the enterprise no longer has this risk as having the bank that is identified in the public mind with the yards run by somebody else and ready to collapse, as it did collapse in 1932.

The Member: So that its reason for existence is really a matter of history rather than a matter of present-day necessity or demand?

Mr. Welch: I should think that was true.

Now I have mentioned all the companies that go to make up this enterprise.

On the third level are the companies which run the great stock yards, which own and lease the great network of rails

that run in to bring livestock in, to take the finished product of the packers out and to bring raw materials to the Central Manufacturing District and take its products out.

The elevated railway structure I mentioned, and Central Manufacturing District, this real estate development where buildings are built and sold on long-term contract—

The Member: Did you say "Railway Company"?

Mr. Welch: Railroad, we call it.

The Member: I think you said "Railway." I think it is important that we should get a term that is not going to be subject to any confusion. I think you had better call it the past railway to distinguish it from this confusion of Railway and Railroad.

Mr. Welch: Maybe the word "Elevated" would be good. It is a single word, and I will strike it and call it Elevated, if we may.

The Member: How is that with you?

Mr. Pierson: That is satisfactory, Your Honor.

The Member: We will call it, the third company, the Elevated.

And could the other company, the Central Manufacturing District, be called something besides C. M. D.? Could that be called the Manufacturing District, or something like that?

Mr. Welch: I don't know whether to make that premise or not. For months we have called it C. M. D.

The Member: We have this difficulty in all these complicated cases; in finding symbols and the poorest symbols you can get are symbols of initials. Nobody likes them. They are confusing and bothersome, and I, myself, have a very distinct prejudice against them. They annoy me very much, and I would like to start out by using something else, if you could devise a term other than "C. M. D."

Mr. Welch: Mr. Green is inventive and he said call it The District.

Mr. Pierson: I think that is all right. However, I might state this: In the stipulation we have referred to it by initials all the way through as C. M. D.; so long as it doesn't become confusing, otherwise.

The Member: That is all right in the stipulation, but when you are talking to me I would rather you use "Commissions." It serves to obstruct my thinking because I get annoyed by it. No use of giving me a psychological jump.

Mr. Welch: As I said, Your Honor, those four companies on that level are owned by the Jersey Company, the intermediate link, but are in turn dominated, directed, and bossed by the top company, the Maine Company. The Maine Company is the bank for all the corporation.

It tells them what to do, when to do it; it chooses the key man, decides their dividend policies, runs their finances and everything of that sort so that the enterprise, although somewhat complicated as we begin to talk about it, really heads up in the Maine Company, the taxpayer at the top of the chart.

It follows that I have mentioned to Your Honor every company that is involved in the case with a single exception, and that is fair because it is not actually a part of the family tree, but you will hear in the case a good deal about a concern called F. H. Prince & Company. F. H. Prince & Company was a banking house in Boston with seats on the New York and Boston Stock Exchange, and Chicago, as well. At all material times it was wholly owned by Mr. F. H. Prince; for many years the only stockholder in the Maine Company; but you will hear a great deal in the case about F. H. Prince for the reason that in the early years after the formation of the Maine Company, when its financial picture was not as rosy as it is now, F. H. Prince was gen-

erally known—should I say—as sort of a godfather,—lent large sums of money to it and has engaged, all through the years, in a series of very important transactions involving the Maine Company such as acquiring stock in the Jersey Company, about which I will be talking to Your Honor in a moment; financing its purchases; buying and securing proxies in other companies so that throughout the case I think Your Honor will hear quite steadily of F. H. Prince, and I thought it is wise to mention it, although they are not on the family tree, so that the company will not be a stranger to you when it begins to be talked about in the case.

Now having dealt with what I call the family tree I should like to proceed to what is more correctly an opening in the case, and I thought, Mr. Clark, I would just sort of tell a narrative story of the thing rather than to say the evidence will show this and that, so that we try to get a picture of what is the history and story of this thing.

Of course it was not always as complicated as it would seem to be on the chart. Once there was just one company; the Union Stock Yards and Transit Company of Chicago, which we call the Transit Company.

That was formed in 1865. At that time there was no central market for live stock in Chicago. Railroads that had terminals in Chicago brought in livestock at scattered places where it was sold and transferred to the slaughter houses.

In that year some railroad men got the idea that a central place to receive stock and have it marketed was greatly needed and the Transit Company was formed at that time.

It operated, when it got going, at yards which are there to this day. It built and operated a railroad called a belt line to bring stock in and take packers' produce out and in time it began to manufacture power, light, and furnish water, which services, as I have said to Your Honor, later

will split off and was done by something called the Produce Terminal Company. It was incorporated under a special act of the Illinois Legislature.

It is interesting to see the old document. It is written in longhand, and it had one interesting and important feature, and that was that by its charter, under this special act, it was limited in borrowing power to the sum of $500,000, and that limit has never been changed and I think it is quite clear that it never will be changed.

Now from the time of its formation until 1890 there was a period of growth, steady and no doubt pleasant, and as it grew, packers, the great packers, Swift, Armour & Company, Wilson, Libby, all those big packers moved in to land just adjoining the stock yards on the west so that stock could be unloaded and driven on the hoof over viaducts and through runways direct from the stockyards to these packers.

Now that concern was a success and obviously it made money. By 1890 the packers began to look on it with somewhat greedy eyes and began to say they were responsible for its success, and they began to threaten that they would move away from this district unless something was done for them and I may say to Your Honor they were indeed very crass about it. They said they wanted to be paid bonuses to stay there, and they were clever; they went over in Indiana to a place called Packing Town, and they bought a tract of land over there and they said in a loud tone of voice, "We are going to move over there unless we get something out of the stock yards."

Well, Mr. Prince had by that time become an owner of some of the stock of the Transit Company.

The Member: When was that, approximately?

Mr. Welch: 1890, is what I am really talking about.

In 1882 Mr. Prince had gone to Chicago and seen the

stock yards, and had bought a few shares of the Transit Company.

Now the Transit Company was appalled by these demands. It was a serious threat and if had this difficulty in its capital structure in that it could not borrow money and it didn't have anything like the sums of money available that the packers were talking about, so a man in Boston named Thayer conceived the idea of forming another company which would have large borrowing capacity and which could have a much broader capital structure than was open to the Transit Company, which company might acquire the stock of the Transit Company and would deal with the packers and that results in the Jersey Company, in the middle of the chart (indicating).

This man Thayer that I have mentioned interested Mr. Frederick H. Prince in this idea of forming a new company, and Mr. Prince went to work on it.

He went abroad to get some of his financing and he went to New Jersey as the State of his incorporation, because it was in 1890, I think, it was true that only a New Jersey corporation could own stock in a foreign corporation. At least it was believed that that was true, so New Jersey was chosen as the State of incorporation of the new company.

There was, however, a price to pay for going to New Jersey, the price being that in 1890 that although a New Jersey Company could own stock in a foreign corporation it could not have a life of more than 50 years. That is to say, that particular kind of a company, a company formed to hold the stock of another company and to deal in it and aid it, was restricted under New Jersey law as it then stood to a life of 50 years.

So the Jersey Company was formed in 1890 with a life of 50 years, which means 1940, naturally, and it had the capital structure of which I have spoken of 6½ million of com-

mon and 6½ million of preferred, and it had the capacity to borrow.

It borrowed ten millions of dollars at that time, and was enabled—thus was enabled to acquire all of the stock of the Transit Company, and it did so; it did so acquire it and owns it today and after it had acquired all that stock the Jersey Company went around to the packers and handed to them large quantities of bonds which the packers gleefully took and in return for which they agreed that they would stay at the stock yards for a period of 15 years; that means 1907, because although the Jersey Company was formed in 1890 the packed contract was not actually signed up and the bonds delivered to them until 1892.

Now the consequence of that, if Your Honor please, was that beginning in 1892 the Jersey Company entered into a period of tranquility. The packers were satisfied; their bluff, if it was a bluff, or the noise, at least, about their moving away was over and this 15-year period of tranquility and growth began.

Now in that period things began to happen about the railway—that is, the steam road, the belt line servicing the stockyards, and I would like to trace through that now to their conclusion.

In 1897 the Transit Company made a lease of its railway of what is called the Inner Belt to a wholly-owned subsidiary of the New Jersey Company which was called the Chicago & Indiana State Line Railway Company.

In 1898 the Jersey Company acquired the stock of a company that was constructing a so-called Outer Belt which was a connecting railway intersecting the lines entering Chicago on a radius further removed from the stock yards than what is called the Inner Belt. That ran from Indiana Harbor to Franklin Park, which Mr. Green says may mean something to Your Honor as a matter of geography.

The Member: Is that Indiana Harbor Belt Railway?

Mr. Welch: That is correct, Your Honor.

Then the New Jersey Company formed this Chicago Junction Railway Company, which was a consolidation of the two companies so that when it was formed the New Jersey owned all the stock of the Railway Company, owned both the Inner and Outer Belts, or at least operating both the Inner and Outer Belts.

In 1907 the Outer Belt was sold. It did not serve the stock yards so intimately, of course, as the Inner Belt, and when the packers clustered so closely around the stock yards, as they did, the Outer Belt was no longer so integral a part of the enterprise as it had been.

In earlier years there had been scattered packing houses further out that had been served to some extent by this Outer Belt but when the thing became centralized the Outer Belt didn't seem to be so important and it was sold.

The Member: Isn't it true—I am bringing in my own memory here—whether it is not true whether the two Indiana Harbor Belt Packing stockyards were only—that the Indiana Harbor Belt was serving industrial Chicago quite other than stock yards?

Mr. Welch: Indeed, and that, I think, was the reason it was sold because it was not so integral a part. There had been a few packers at Hammond, Ind., which had been served in the earlier years.

In 1913 the lease between the Transit Company and the Railway Company was revived, the principal change being that under that lease the lease was in perpetuity whereas the earlier lease had been for a term of years and the rental in the 1913 lease was fixed at approximately $600,000.

The Transit Company never actually operated the Railway Company after 1897, and indeed when 1922 comes

around, as I told Your Honor earlier, the New York Central, through a subsidiary, becomes a lessee of the Inner Belt and pays the rather gorgeous rental of $2,000,000 a year for that privilege, so that after 1922 you have a purely lessor situation as far as the stock yards' enterprise is concerned, and the operations by the New York Central.

I ought also to add that between 1897 and 1922 the Railway Company actually operated and then ceased in 1922 and I think Your Honor would have drawn that inference.

Now I would like to go back for a moment to the Jersey Company and its bonds and the supporting mortgage.

The Jersey Company began, in 1890, with a $10,000,000 bond issue. That was a five percent issue, and it was due in 1915.

In 1892 it issued $3,000,000 of debentures which were those bonds I mentioned that went to the packers and it also issued $400,000 of 5 percent notes in 1898 by that Outer Belt, of which I have spoken.

By 1900 the Jersey Company had outstanding in bonds and notes $13,000,000 and it decided at that time to refund those notes and its $10,000,000 bond issue, and so in 1900 a new bond issue was put out by the New Jersey Company in the sum of $14,000,000, four millions of it was used to retire the notes and the packers' debentures, and the $10,000,000 was reserved to retire the original $10,000,000 issue when it became due in 1915.

Now this mortgage was secured by all the stock of the Transit Company, and also by all the stock of the Railway Company.

Now when 1915 came around you couldn't refund the $10,000,000 at 4 percent, and it was necessary to amend the indenture and increase the interest 1 percent to 5 percent, so that as of today the Jersey Company has $14,000,000

of bonds outstanding due in 1940 of which issue $4,000,000 carry 4 percent and $10,000,000 carry 5 percent.

Now I want to go back for a moment to the sale of the Outer Belt in 1907. Part of the consideration of that sale, or for it, was $2,500,000 in bonds of the Indiana Harbor Belt Railway Company.

Your Honor will remember that at that time all the stock of the Railway Company was pledged to support this Jersey mortgage and the trustee of the mortgage took the position that the stock could not be voted in favor of the sale of the Outer Belt unless that $2,500,000 worth of bonds were brought under the New Jersey mortgage as further security for it, and the consequence was that that happened.

I think I have already said to Your Honor that the preferred and common shares of the Jersey Company always have had equal voting power

I now want to turn to what I shall strive hereafter to call the Elevated Company.

In 1903 an ordinance went through in Chicago requiring all railroad tracks to be elevated and that hit, of course, the railway whose tracks then had to be elevated.

Prior to that time people who worked in the stockyards or a packing town had poor facilities for reaching work, and the occasion of the elevation of the freight tracks created a favorable opportunity to construct an elevated line which should connect with the South Side Elevated, as I have told Your Honor earlier, and with a loop running around the stock yards and packing town so that workmen and passengers could get brought in by a modern method; so in 1903 this Elevated Company was formed. It took in excess of $2,327,000 to construct it, as will be developed in the testimony, but it was thought it could be constructed for that figure. Those were the first estimates.

So when the Elevated Company, the Chicago Junction

Railroad Company, was formed, the idea was that it should issue bonds in the amount of $2,327,000 to get funds to build the loop.

That company, however, had no credit and it was necessary that the Jersey Company guarantee its bonds both as to principal and interest so that the bond issue could really be placed and the funds raised, and that was done.

It will appear that additional funds were necessary to complete its construction, which were furnished by the Transit Company and the New Jersey Company, and when it was completed it was leased at a rental which precisely equaled the interest on its bonds plus taxes, and which offered no hope that the lease would ever turn into a sum of money that would retire that bond issue. Worse than that, in the end, the South Side Elevated went into receivership and for some years, now, the Jersey Company has been paying the interest on the bond issue of this Elevated concern, and the taxes, as well.

The testimony will be that at the end it is clear it will have to pay the bonds, themselves, under its guarantee.

The Member: Just a minute. I wish you would read the last sentence or two. I think there is some confusion.

(Record read as follows:

"Worse than that, in the end, the South Side Elevated went into receivership and for some years, now, the Jersey Company has been paying the interest on the bond issue of this Elevated concern, and the taxes, as well.

"The testimony will be that at the end it is clear, it will have to pay the bonds, themselves, under its guarantee.")

The Member: All right. I misunderstood you.

Mr. Welch: Now I turn to the District; that is this real

estate and tonnage development to the north and west of the stockyards.

At the time of its acquisition by the Jersey Company this was quite a large tract of vacant land. It was of interest to the Transit Company for two reasons; in the first place, it was something of a threat to the stock yards as a possible location to which the packers could move or threaten to move, as they had done in 1890, but very much more important than that it lay adjacent to this net work of rails and thus offered an opportunity to develop a manufacturing district that would supply both incoming and outgoing tonnages for the railroad and so that area of land was acquired, and, as I have explained, by a trust, all the shares of which were owned by the Jersey Company, and through the years that district has been developed with success until it is a small city, and the testimony will show, of successful industries and a large builder of tonnages for the railroad. It has issued bonds from time to time and the amounts vary throughout the years, in this case, because some were serial bonds, but at the end of 1933 the amount outstanding was $2,250,000, and those bonds also bear the guarantee of the Jersey Company.

Now, Produce Terminal, I need say little about, now, because I have already indicated to Your Honor that it grew up somewhat like Topsy did: They began to make power and light for themselves, "They" meaning the Transit Company. Other people began to buy it and it reached the status and the size so that the Commerce Commission of Illinois said it had to be separately incorporated, and it was so incorporated.

Originally all its stock was owned by the Transit Company. Through the years the stock was passed first to the Jersey Company by the Transit Company as a dividend; later passed by the Jersey Company to the Maine Com-

pany as a dividend where it now is wholly owned by the Maine Company.

Now my history has led me to the point where you meet with the formation of the Maine Company and there I think it becomes somewhat less dull than it has been, let us say, for the last 10 or 15 minutes.

Your Honor will remember that that contract with the packers by which they agreed to stay at the yards expired in 1907 and when 1907 came around the packers came right around with some more demands and some more threats.

This time their demands were rougher than they were in 1890. This time they said they guessed they would like to own the Jersey Company; that it would be all right with them if the old stockholders of the Jersey Company continued to get some return on their stock but that except for that they guessed they would like to own it, and a period of negotiations that actually lasted for years, began.

The directors of the Jersey Company, of which Frederick H. Prince was one, were frightened by the packers. They were divided in their councils. They didn't know what to do.

The Member? Is that ownership fairly well diversified or is it in one—

Mr. Welch: Yes, pretty well diversified although Mr. Prince, by this time, had become quite a substantial stockholder in the Jersey Company. I think the evidence will be that he owned two or three thousand shares.

The Member: Out of how many?

Mr. Welch: Oh, out of 65,000 common, and there were just hundreds and hundreds of shareholders. There was no strong, dominant figure in that.

Well, these frightened directors thought of everything they could and among other things the idea of another bonus was discussed by them, and we are further along

in history than we were in 1890, and some directors doubted the validity of the payment of bonuses and in the end they paid a small bonus to a packer, a little packer and pointedly directed the attention of the Department of Justice to the payment so that a test case could be brought, and the test case was brought and in the end it was decided in that case that the bonus was illegal but that decision was of very little importance because Mr. Frederick H. Prince had invented a bold idea. He made up his mind that if in some way Armour & Company could be split off from the group of packers and in some way satisfied and kept at the yards, everyone else would follow suit, and so Mr. Prince got the idea of really doing the 1890 thing over again, when the Jersey Company was formed, and forming a new company to deal with the packers, but he meant to deal with one, only, believing that the rest would stay if the great Armour plant stayed, and so he formed this Maine Company and Armour, Mr. J. Ogden Armour, became a shareholder in the Maine Company to the extent of, roughly, 20 percent.

Now when the Maine Company was formed it did this: It offered to the Jersey shareholders alternative options. It said to a Jersey shareholder, "If you wish, you may have bonds of the Maine Company and we will give you $200 in bonds for $100 in stock of the Jersey Company, and those bonds will pay 5 percent, so that you will get on your single share of Jersey stock 10 percent.

"If you don't want to do that —";

The Member: You are talking about an exchange!

Mr. Welch: That is right; an exchange of Jersey stock for bonds.

"If you don't want to do that, you may turn in your Jersey certificate and have it stamped with a contract between the Maine Company and you, as a stockholder, under

which contract the Maine Company will guarantee to you nine percent as a dividend."

That, by the way, was one percent better than the maximum that the packers in the five-year wrangle had ever said they would allow the Jersey shareholders to have.

Now, $1,000,000 went into the Maine Company that time, so that the shareholders of the Jersey Company could look to a company that had a million dollars in cash in it to guarantee that they would receive interest on their bonds, if they took bonds, or receive this guaranteed dividend, if they turned in their stock and had it stamped.

And what happened was that the directors of the Jersey Company and its stockholders—shall I say—gave three cheers, the long period, this agonized period of wondering whether their company was going to be destroyed by the packers, was over.

Here was the company in the hands of a strong man who was guaranteeing them either bond interest or fixed return on their shares, and they flocked in and exchanged shares for bonds, or had their stock stamped. I think it is implicit in what I have said to Your Honor that the contract with the Jersey shareholders naturally provided, if they were guaranteed 9 percent on their stock, all earnings in excess of 9 percent were to go to the Maine Company, but I should perhaps have stated that.

By the end of 1911, 18,705 shares of the Jersey stock had been turned in and exchanged for bonds. By the end of the year 1912 31,843 shares had been stamped with the guarantee, and 30,871 shares had been exchanged for bonds, leaving only a couple thousand outstanding.

By 1914, in August, out of 65,000 shares of Jersey common and it is common of which I am speaking, 33,922 shares had been stamped with the guarantee, and 31,075 shares turned in for bonds, and at that time the owner of 3 shares

of the Jersey Company could not be found, but in the end he was found and every share of stock in the Jersey Company finally, either is exchanged for bonds or accepts this stamp and this guarantee.

I think it is of some interest to observe that on two occasions, first when the Jersey Company acquires the Transit Company stock—at the end every share is acquired and again it is interesting to think that when the Maine Company was formed every share of stock comes in either to be exchanged for bonds or to accept the stamp and the guarantee.

Now I think at this point it is important to see what the position of the Maine Company is. It owns, let us say, in 1912, no preferred stock of the Jersey Company. It owns, roughly, half of the common stock which has been exchanged for bonds. The other half of the common is outstanding, bearing the contractual stamp of which I have spoken.

The guarantee on that stock was unlimited as to time, although the Jersey Company's charter expired in 1940, and, remembering, as I pointed out to Your Honor, that the preferred had full voting rights, the Maine Company has roughly 25 percent of the voting rights of the Jersey Company, and that is all it has although it does have, in addition to this contractual right, to receive earnings in excess of 9 percent, and I will say to Your Honor that that contractual right proved to be of value because through the years the Jersey Company has earned more than that, so that the Maine Company has actually made a profit on the contract.

Now, if Your Honor please, when all this had happened, I suppose it is fair to say that Mr. Prince must have taken a sort of a deep breath and said, "Well, I have got somewhere. The packers didn't move"—because I should say

to Your Honor that his idea that if Mr. Armour subsided, didn't threaten any more to move, that everybody else would stop his threats, and that happened, and once more this enterprise moves into a period of relative tranquility.

But Mr. Prince looked around and sized up his situation. He was, of course, the large owner of the Maine Company; owned 80 percent of it, and Mr. Armour owned only 20 percent, and there were, it will appear from the evidence, two possible alternatives before Mr. Prince; one was to treat the Maine Company as what you might call pure adventure, hoping it would make some money above the guarantee to the Jersey stockholders; take in its money declared out in dividends and bow out of the picture when the Jersey charter expired in 1940. That was one alternative.

The other alternative was to get busy in the 25 years or so that faced it and get in such a position when the Jersey Company charter expired in 1940, the Maine Company would at long last own the enterprise.

The contract that he had with the shareholders of the Jersey Company relating to the guarantee of 9 percent had no provision whatever in it as to anybody's rights on liquidation of the Jersey Company. It dealt purely with earnings.

It will appear in evidence that Mr. Prince made his choice promptly, and his choice was the choice Your Honor would have made. He made the choice that he would, if possible, get the Maine Company in position so that when the Jersey Company's charter expired in 1940 the Maine Company would, as I say, succeed to the ownership of this concern. That's in 1911 or 1912. There was no income tax to be thought of. It was not yet on the books.

And so he made that choice that I think Your Honor would have made.

The Member: You don't exclude the corporation excise tax, do you?

Mr. Welch: I am speaking only of income tax.

The Member: Well, as to the corporation?

Mr. Welch: There was a small excise.

The Member: I know, but it was based on income. You can't say there wasn't any income tax in 1910 or 1911 when you had a corporation excise tax based on income.

Mr. Welch: I should have said individual income tax.

The Member: You are talking about only Mr. Prince.

Mr. Welch: Yes, Mr. Prince himself.

That is to say, I think it is quite clear that nobody will claim this company was formed for the purpose the Government complains of, because it was formed in 1911.

Now what could Mr. Prince do, and what should he do, as he made this decision?

He couldn't do anything about the Jersey bonds. There isn't much point in doing anything about the Jersey preferred, because that is not callable, it can be retired at par in 1940, but not before then. There was, however, one thing he could do, and that was to go out into the market and acquire Jersey common in the hands of the public with the stamp on it, as rapidly as he could, so that he would grow from 25 percent voting power to all the voting power of the common, if he could achieve that program.

Now, it is at that time, if Your Honor please, that this F. H. Prince Company, this banking house of which I have spoken, comes forward.

The Maine Company has only a million dollars, and its earnings don't turn out to be very happy in the early years. It has never got much money in its treasury, but F. H. Prince & Company, under Mr. Prince's direction, marches out and puts out its own money and buys Jersey common for the account of the Maine Company.

It starts before Christmas is celebrated in the year of the incorporation of the Maine Company, and by 1918 F. H. Prince & Company has acquired, roughly, 18,000 shares of Jersey common, and has spent over three millions of dollars in doing so. That is three times the complete capital of the Maine Company.

Not only that, the program of acquiring that common has gone on steadily through the years, and F. H. Prince & Company has watched for every death of every stockholder of the Jersey Company, or every share coming on the market, and at every opportunity has steadily acquired it until today over 99 percent of that common stock of the Jersey Company has been acquired through F. H. Prince & Company, by the Maine Company.

Now, all well and good for Mr. Prince's program. He has done what he can about the stock; he doesn't need to worry about the preferred, because it will be paid off at par in 1940; he doesn't need to worry about acquiring it, but he had some liens on this enterprise ahead of that common stock. And what are those liens? Well, a big one is that Jersey bond issue of $14,000,000, due in 1940. Some more things to think about are bonds that have been guaranteed by the Jersey Company, about $5,000,000. And another thing to think about is that six and a half million dollars is going to be required to pay off the Jersey preferred in 1940.

And so the evidence in this case, if Your Honor please, will be that Mr. Prince, when the time came that he could do it, began to accumulate funds in the Maine Company to discharge those liens that were ahead of that common stock ownership, and really to own this enterprise, and, if possible, own it free of debt, in 1940.

I want to say at this point, however, that he did not accumulate everything. He has had a steady dividend policy,

It became steady after that lease of the Railroad to the New York Central. That stabilized and made quite secure the income of the enterprise, and, as a consequence of the Maine Company,—and beginning in 1924 there had been dividends prior to that, although somewhat irregular, and some years skipped,—Mr. Prince established a rate of 5 percent on the 80,000 shares of the stock of the Maine Company. That was $400,000 a year. His testimony will be that he said to himself that he thought he was entitled to a very substantial income for having put the enterprise in its present condition; that 5 percent seemed like a fair income to him, and that it was his opinion that the Maine Company could stand that large a dividend and still carry out its program that it had facing it by 1940.

Now, one other thing at this point that I think is of some interest, and that is this, if Your Honor please; Mr. Prince visualized the Maine Company; in the early years he visualized it as what it is today, as the top company, the boss company, the managing company, and the banker for the group, and very early the policy of sweeping all of the earnings through from the bottom to the top was begun, and throughout the case when Your Honor comes to study it you will find this extraordinary fact, that the operating companies, except for bare requirements of working capital, have through the years steadily been stripped, and the money accumulated in the Maine Company where, so the testimony will be, it can be used for this 1940 crisis.

Now, if Your Honor please, the program that Mr. Prince formed and has been carrying forward, has not been all clear sailing. There have been interruptions and troubles, and serious ones. Curiously enough, the old packers' troubles bobbed up once more. In the end, meaning by the end of that phase of it, in 1920 and '21, a suit was brought against Mr. Armour by the United States in which it was

sought to have him ordered to dispose of his holdings in the Maine Company, the belief being that it was bad that a packer should own an interest in the stock yards. In the end, a decree was entered and Mr. Armour was ordered to dispose of his stock. Now, I say—

The Member: What was that, a Sherman law case?

Mr. Welch: It was.

Now, the old packer trouble is up once more for what I hope, or what Mr. Keeney, general counsel for the company, would have hoped was its final phase. It didn't turn out to be. Mr. Armour has been ordered to sell his stock. There isn't anyone in the old country that would buy it at anything like a fair price except one concern, the Maine Company, but Mr. Prince quickly said to himself, "Mr. Armour has got to be paid a fair price. I have got to keep his good will."

Some plans were worked on with the Department of Justice about issuing bonds of the Maine Company to buy Mr. Armour out, and the Department of Justice said no. Then the Maine Company tried the suggestion of taking preferred stock of the Maine Company, and the Department of Justice said no. And in the end it became clear that Mr. Prince would have to buy the Armour stock and pay a fair price for it. That was done. Mr. Armour for his 20 percent interest in the Maine Company received, in the end, $2,300,000, $2,000,000 of which were bonds of the Maine Company, and $300,000 of which was cash.

Now, I want to take a moment to tell Your Honor how that transaction was put through, because it has an important bearing on this whole case. At that time, in 1922, F. H. Prince & Company have through the years been buying Jersey common for the Maine Company, as I have explained to Your Honor. The Maine Company owed even as late as that about 2½ million dollars to F. H. Prince &

Company for stock so purchased. F. H. Prince & Company had that stock in its possession, and, in turn, had pledged it on bank loans as any stock broker does with customers' securities to raise more funds to buy more stocks. When the $2,300,000 was needed for Mr. Armour, the Maine Company took $2,000,000 in bonds and $300,000 in cash and gave it to F. H. Prince & Company in payment pro tanto of the debt of the Maine Company to F. H. Prince & Company. It just about wiped out what the Maine Company then owed F. H. Prince & Company. Mr. Prince then took that from F. H. Prince & Company and handed it over to Mr. Armour, all, incidentally, under a plan that was filed in the United States Court working the whole thing out, and received from him his stock.

Now let us think for just a moment what the position of F. H. Prince & Company is. Its principal asset, and an interest-bearing one, by the way, had been this debt from the Maine Company of, roughly, 2½ million dollars.

The Member: Did you say that F. H. Prince & Company is a corporation?

Mr. Welch: No, it is a banking concern. We have agreed for purposes of this case that Mr. F. H. Prince and F. H. Prince & Company are identical; that is to say, it is wholly owned by F. H. Prince, the banking concern. On the other hand, it has a separate set of books; it is a unit of its own.

The Member: But it is an individual business?

Mr. Welch: It is an individual business, but Mr. Prince—

The Member: It is not a partnership, not an association, not a corporation, but an individual business?

Mr. Welch: There was another small partner in it, but we have said that it was still thoroughly dominated by Mr. Prince, and we have agreed as between Counsel that it should be treated as his personal business.

The Member: Technically, is it a separate taxpayer?

Mr. Welch: No.

The Member: So that its income is reflected upon the individual income tax return of Mr. Prince?

Mr. Welch: It is.

The Member: When you speak, therefore, of F. H. Prince & Company, I don't have to bear in mind any distinction between it and the individual person?

Mr. Welch: I think probably the answer is really yes, but I ought to warn Your Honor to this extent: F. H. Prince & Company was looked on by the New York Stock Exchange as a unit separate from F. H. Prince. For example, it was looked on by its customers as something other than F. H. Prince—

The Member: Well, who owns the Stock Exchange seat? F. H. Prince individually?

Mr. Welch: F. H. Prince, individually.

The Member: Was there any recognition of the fact that he was holding it or acting as the representative of the company, so that it was separate?

Mr. Welch: Certainly, certainly. That was fully recognized.

Bank loans, however, of which I am now speaking, were always made to the banking house of F. H. Prince & Company as if it were something entirely separate from Mr. F. H. Prince. But I wish to make my position clearer. We all know in reality, and we have agreed that it was F. H. Prince who owned F. H. Prince & Company. It was another name for him, but it was a business with customers, with bank loans, with Stock Exchange relationships, and run as a banking and brokerage house.

The Member: I am trying to get in my mind the difference between F. H. Prince, individually, as a shareholder of this Maine Corporation, and F. H. Prince & Company as the party to the several financial transactions such as

the pledging of the shares, and the transaction with Armour and others. If I am to keep any thing of that sort separately in my mind, I want to know it, and, if, on the other hand, there is no harm in my confusing the F. H. Prince & Company with F. H. Prince, I want to know that. That is all I am thinking about at the moment.

Mr. Welch: F. H. Prince had many activities as an individual not connected with F. H. Prince & Company; that is to say, he would become a large owner of stock, and I remember on one occasion he was receiver of a big railroad company. Historically, Prince & Company was a unit and dealt with as a unit, and something of some interest may develop, Your Honor, from that point of view, but no one is trying to claim that it was anything other than F. H. Prince, because he did own it all.

Now, as I have said, when that $2,300,000 was paid by the Maine Company to F. H. Prince & Company, it discharged pro tanto, and, in fact, almost entirely the debts then owed by the Maine Company to F. H. Prince & Company for having acquired these Jersey common shares. At the same time, those shares, as I think I have said, were pledged on bank loans of F. H. Prince & Company, and when the $2,300,000 in bonds and cash comes out of the Maine Company, it goes to Mr. Armour, and it leaves Prince & Company, F. H. Prince & Company minus its large asset of this debt from the Maine Company, interest-bearing, by the way, on the one hand, and on the other hand it leaves it with those Jersey shares pledged to banks, which shares belong to the Maine Company and must in time and in some way reach there.

And so what happens is this: That as the years go on, F. H. Prince & Company reduces its bank loans and frees that Jersey common and delivers it to the Maine Company, but in order to do so, in the end, it is necessary for the

Maine Company to lend money to F. H. Prince & Company to free that Jersey common and get it into the hands of the Maine Company. It is only fair to say that the Armour deal in 1922, and this $2,300,000 going out seriously cut into the financial set-up of F. H. Prince & Company, and except for these loans by the Maine Company to F. H. Prince & Company to free that Jersey stock, I see no simple way in which it could have been done.

Now let me pass that for a moment and come to what is at long last, I hope, the end of the packer trouble. By 1932 Mr. Armour is dead, and Armour & Company is being run by some one else, and Armour & Company begins to go out into the country and buy its livestock direct from farmers and producers, and bring it into Armour & Company and by-pass the Chicago stock yards, paying no unloading, feeding, watering charges. They are under contract, curiously enough, not to do so, because in that old 1890 contract, while I said it was for—1892 contract, although I said it was for a period of 15 years, there is a single covenant that is not limited in time, by which Armour & Company agrees never to operate a stock yards—never to operate a stock yards in Chicago. And yiu assume that the little yard where stock is Chicago. And if you assume that the little yard where stock is unloaded and immediately taken by truck to Armour & Company is a stock yard, they are violating that old covenant when they threaten to buy in that way.

But, in any event, Mr. Prince made up his mind that this method of doing business, already, to some extent, operated by Swift & Company, and now threatened by Armour & Company, was a bad thing. He thought it was bad for the Maine Company, because it meant reduced revenue. He thought it was bad for this market, because unless that great big market was maintained with competition for the purchase of livestock, the time may readily come when the

packers would have the producers at their mercy if they could buy directly from them, and from them only, and not have to compete in this big market.

Not only that, Mr. Prince felt that the practice was bad for Armour & Company, because if the market at Chicago was destroyed for any reason, and there are lots of competitors farther west, that the packing plants, themselves, would go down in that destruction.

And so Mr. Prince, in 1932 and 1933, bought into Armour & Company, bought voting stock in Armour & Company, and not only that, F. H. Prince & Company, as a brokerage house in good standing, canvassed the market for proxies, and got all it could, and, as a consequence of that, Mr. Prince has been elected to the board of Armour & Company, chairman of the Board.

Now that again required a million dollars, and a million dollars and over came from the Maine Company, in the form of a loan to F. H. Prince & Company, and they went out and acquired the stock.

I do not suppose I need point out that the Maine Company felt that it couldn't buy the stock directly, because many own stock in the Maine Company, it would seem a natural corollary that the Maine Company couldn't own stock in Armour; but Mr. Prince felt, and indeed was correct, I think, in thinking that he personally could own it.

So, I mention those transactions, if Your Honor please, because they resulted in something that looked like loans, and, in fact, are loans, from the Maine Company, this taxpayer, to F. H. Prince, or F. H. Prince & Company.

I am pointing out to Your Honor this early in the case, however, that in no sense are those loans substitutes for dividends, but that those loans were made to enable F. H. Prince & Company, or F. H. Prince, to do something on be-

half of the Maine Company that for some reason it could not do itself.

The original Armour transaction, for example—the Maine Company tried by every device it could to deal directly with Mr. Armour, and buy his stock, and was forbidden to do so by the Government, and so the money was furnished by the Maine Company through F. H. Prince & Company, and then as a consequence of what I said to you, loans in substantial sums were necessary to lift that Jersey common, or free it from these loans of F. H. Prince & Company.

With a single, and I think a quite trifling exception, everything that has been borrowed from the Maine Company has, as I have pointed out, been used for purposes of the Maine Company, and everything that has been borrowed by Mr. Prince personally has been instantly turned in to F. H. Prince & Company.

And I might add that since 1927 practically the sole activity of F. H. Prince & Company is to act as the servant of and the agent for the Maine Company in such things as searching for Jersey's common, buying it as a broker, running the campaign of buying into Armour & Company, getting proxies to vote stocks, and things of that sort.

As early as 1927, Mr. Prince, who seems among the wisest of men, thought that he saw trouble coming, and although F. H. Prince & Company was doing a very sizable brokerage business with many customers, he issued instructions that he wanted everything pulled and the sails reefed, and, among other things, he issued instructions that he wanted all the Jersey common got out of bank loans and into the hands of the Maine Company where no storms such as came along in 1929 to 1932 could hurt it.

Now, one last and very serious interruption to Mr. Prince's program is represented by the Live Stock National Bank on this chart. As I said to Your Honor in my opening,

there was prior to 1932 in Chicago a bank that was doing business that was identified in the public mind with the Chicago Stock Yards' enterprise, although that was not, in fact, true, it was just located at the entrance to the yards, but every buyer, every trader in live stock that had gone on some freight train in the West and gone to the stock yards, had sold his stock and dealt with the commission man, and they had gone over to this bank to do business, and every single one, no doubt,—that will be the evidence, I believe,—thought it was part of the enterprise.

Now that bank got into serious trouble, as most banks did, and when the moratorium came it was closed, and it could not reopen. There is more to the story in the sense that there were two failures really, one reorganization in the second one, but I will telescope them for the purpose of this opening, and, as a consequence, Mr. Prince made up his mind that in order to protect the reputation of the yards throughout the country, and to save this enterprise from a black eye from which it might never recover, it was necessary to go to the rescue of that bank, and that was done. And in the end slightly over ten millions of dollars of the Maine Company, and of its subsidiaries, was poured into that situation to save that bank, some in the form of purchasing stock of the new bank, and millions of dollars in subordinated deposits, secured only by the worst layer of collateral, or investments, in the bank.

There will be testimony that when Mr. Prince was told that he had to do that, that he had every one that was working on it try to get money from the yards, or from any source that he could, that he said to them, "I don't want to use the Maine Company money if it can possibly be avoided in view of the needs of that company." But, in the end, it was necessary to do so, and that money went in, result-

ing in the Live Stock National Bank of Chicago appearing on this chart.

And then there was an interesting thing about that. When it was all done, and the subordination agreements entered into, Mr. Prince insisted that the Maine Company's money should come out first of all. So that when 1940 came around, and he had this problem of bringing this Jersey Company to the end, the Maine Company would get out of that bank situation, first of all, its funds, so that there would be no delay in them filtering up through the other companies, but that they would have it as quickly as they could.

That, I think, is a fair outline of what the Petitioner in this case will show. The evidence will be that the Maine Company is not a mere holding company, that it is far from it, that it dominates and directs the whole enterprise.

We will show that at no time did Mr. Prince ever have any intention of evading the imposition of a surtax, and that throughout the years, again and again, by declarations, and by acts, he made his intention clear, and we will show that in no sense have the earnings been accumulated beyond the reasonable needs of its business, because we will show that the cogent need for money in 1940 was present, and that Mr. Prince has steadily planned for that need, and that his plan for 1940, based upon a reasonable dividend, has been adhered to steadily since as early as 1911 and 1912, through thick and thin, depression or no depression, and is adhered to today, and that even today while we hope the goal is in sight it certainly has not yet been passed.

The Member: What—I am surprised there isn't any copy of the notice of deficiency appended to the petition. What is the reason for that?

Mr. Welch: That—I cannot answer that—it was filed—by not—Mr. Green, I think— It can be produced.

Mr. Green: The copy of the deficiency notice is on the copy that I have.

The Member: Not a part of the petition; there is the petition and the verification.

Mr. Green: Mr. Moyer had charge of that, Your Honor. He said the notice was filed with the petition.

The Member: I see it was filed as an amendment to the petition.

The petition was filed on April 23, 1936, and the notice of deficiency, if that is what it was, filed on May 29, 1936. I am looking at it, Mr. Welch, only, or asking about it, only for the purpose of ascertaining what it was that the Commission determined in this case as the basis for the deficiency.

Can you say that?

Perhaps I misunderstood it, but the thing I am looking at which I have already referred to, seems to be notice of deficiency, doesn't seem to me, at a hasty glance, to make any reference to section 104.

Is that correct?

Mr. Moyer: Simply makes a computation of the tax liability, Your Honor, without any reason set forth for the imposition of the section 104 tax.

The Member: What is it that leads you to believe that 104 was invoked by the Commissioner as a basis for a determination of the deficiency?

Mr. Welch: The amount of the tax—

Mr. Moyer: There is a statement made to that effect.

The Member: Where?

Mr. Clark: It is on the first page of the computation, Your Honor, and the last paragraph before the details of the computation for the year 1930, if Your Honor has it before you,—"After consideration of your federal income tax returns, the protest mentioned above, and all the avail-

able information, the Bureau holds your corporation is subject to taxation under section 104 of the Act of—"

The Member: Is that the whole determination?

Mr. Welch: That is the whole determination.

Mr. Clark: At the—

The Member: I mean there is no determination that would give us an indication as to whether it was because a holding or investment company, or whether because it has an unusual accumulation of earnings, or any other factual determination that would lay a foundation for 104.

Well, what about the—the petition, then, in so far as it states an issue? I do not want these issues to be floating in mid air purely because there happens to be a section called 104 in the statute.

What are the issues that were made, Mr. Welch, in the petition?

Mr. Welch: I may—

The Member: What is it, in other words, that has been alleged and denied which makes an issue under section 104?

Mr. Welch: I am a little puzzled as to what has been alleged, but—

The Member: Well, that is your moving instrument, isn't it? Your petition is what contains the—

Mr. Welch: I mean by that, alleged by the Commissioner.

The Member: Well, there isn't any—unless there are affirmative allegations in the answer. I am talking about the allegations of the petition.

Mr. Welch: Will you wait—if Your Honor please, the petition was drawn by Mr. Moyer's office, so that I—

The Member: I would like to have from—and this is the time to get it—from both sides, a statement of the issues as they have been plead, as they appear of record, so that

we may know precisely what the questions are to which this evidence is to be directed.

I have got to tie this narrative statement to something, and that is the way I want to do it.

Mr. Moyer: Your Honor, may I speak on that?

The Member: Yes.

Mr. Moyer: I think we have covered every possibility under section 104. The alleged error on the part of the Respondent that the petition was in any manner formed or availed of for the purpose of avoiding the imposition of surtax on the shareholders, is erroneously asserted to the full extent that it is in any way, manner or form based upon the theory or assertion that the petitioner is a mere holding or investment company, or that its gains or profits were permitted to accumulate beyond the reasonable needs of the business.

The Member: Those are in your assignments of error?

Mr. Moyer: Those are in our assignments or error.

The Member: Now where are your alleged abundant facts on which we will decide this case?

Mr Moyer: Shall I read the facts?

The Member: Yes, if you please.

Mr. Moyer: First, the Petitioner alleges that it did not in any of the years 1930, 1932, or 1933 violate the provisions of the Revenue Act set forth in '32 under Section 104 thereof.

The Member: I don't think that quite touches it. Do you have the facts I want, Mr. Moyer?

Mr. Moyer: That, of course, is a preamble to the facts, and we cover particularly, I believe, the same grounds that Mr. Welch has covered in his opening statement, setting forth the corporate set-up of the various organizations.

I am reading— Have you a copy, Your Honor of the

The Member: Yes.

Mr. Moyer: I am reading on page 6: "Petitioner next alleges that such portion of its gains and profits for the years 1930, 1932, and 1933 as were not divided or distributed in these years were not permitted to accumulate for the purpose of preventing the imposition of the surtax upon its shareholders."

The Member: I don't see that. Did you say page 6?

Mr. Moyer: Page 6.

The Member: On page 6, I have sub-division with a capital "I," and paragraph beginning "Petitioner's Incorporation" and another paragraph beginning "Organization of Petitioner."

Is that your page?

Mr. Moyer: May I refer you to page 8?

The Member: Of item 2?

Mr. Moyer: Item 2.

The Member: Two aught.

Mr. Moyer: Two aught, that is right.

But I believe the fact that the resume in this petition covering facts is in line with Mr. Welch's presentation of the facts this morning—

The Member: Well, his presentation, I suppose he might have made that presentation in the history of this organization and to support any one of a thousand possible litigations; but I am trying to find out how to tie it up now to the issue in this case.

Mr. Moyer: Well, I will be glad to read these facts.

The Member: Well, I don't want you to read. I would like to get in my mind, as quickly as possible, how to tie this narrative statement which I have tried very hard to follow, up with a concise and succinct statement of what the significance is in this case.

So far—

Mr. Moyer: Your Honor—

The Member: —I don't know whether it has any significance, whether it refers to section 104, or anything else. I have heard Mr. Welch say that there is no holding or investing company or no earnings that were permitted to accumulate beyond the reasonable needs of the business. *Is that the* issue, and if so where is it made?

Mr. Moyer: Your Honor, that is the issue. The only particulars on which the Petitioner was able to file a petition was a statement that Mr. Clark read from the deficiency-notice. There were no particulars in the deficiency notice, and in the petition an attempt was made by facts to cover the various phases that are comprehended within 104.

The Member: Well, perhaps it is up to Mr. Clark to tell me what the Commissioner meant by his determination. Are you through, Mr. Welch? I didn't mean to interrupt you.

Mr. Welch: Oh, I am.

The Member: You have made your statement now, have you?

Mr. Welch: Yes.

Mr. Clark: Your Honor, the position of the Commissioner is set forth in the deficiency notice. It resulted, as I understand, from the fact that there were long negotiations with the Bureau prior to its issuance, and I think that there was no misunderstanding at the time that letter was issued. All of the allegations which Petitioner has made relative to the activities of this corporation as in possible violation of 104 have been denied by the Respondent. What happened was that the Commissioner determined these various substantial deficiencies for the years 1930, 1932, and 1933 in amounts varying from somewhat

over a million to nearly two million dollars, with a total of somewhat over four million dollars.

In determining those deficiencies, the Commissioner held that the Petitioner was subject to taxation under section 104. Now, all the testimony is reduced either in major portion, I think, as it is applicable to the facts set forth in the stipulation of facts, and such other evidence as may be material in addition thereto which will be adduced by either side.

The Member: I haven't section 104 before me, but drawing on my recollection of it, isn't it true that section 104 contains two or more alternative possible grounds?

Mr. Clark: Yes, that is true.

The Member: For the 50 percent addition to the tax? One of which, for example, under one letter is that the Petitioner is a mere holding or investment company, and the other one, that it is—no. Then there is one that has to do with the unreasonable accumulation of earnings which is said to be the prima facie evidence of the purpose to escape the tax.

What I am trying to do is to fix such a notice of deficiency as this is leaves one in very serious doubt as to what it is that the Commissioner is undertaking factually to determine, and if we are to attach to the Commissioner's determination the presumption of correctness, it would seem to me that there must be some determination to which to attach to it, and the presumption doesn't go to a proposition of law; it goes to a question of fact.

I should think that you can't send out a notice, that is, properly send out a notice of deficiency which is in the nature of a shot-gun notice, saying 104, 50 percent. Now, that is substantially what this comes to, and when we get to the point of litigation it is important that the tryer, at

least, shall know to what the evidence in the case is to be addressed.

Mr. Clark: I wouldn't say, Your Honor, that presumption went solely to questions of fact. I think that it is also a presumption as to a matter of law that the Commissioner is correct in his determination. Now, I will grant you that there are certain deficiency notices which are sent out which are not complete and not what we would like to see, but I see no defect in this notice.

The Member: Well, the only defect is the difficulty of comprehending what it is that the Government has determined as the reason why a taxpayer is called upon to pay a very substantial deficiency, and I am not speaking in terms of procedural criticism so much as I am speaking in terms of the difficulty that I, as a primary tryer of the fact, has in understanding what the question is that I am being called upon to decide. If the Government is saying that the 50 percent penalty is to be imposed for one or the other of several reasons, that would eliminate from my thinking entirely the reasons which the Government does not think are necessary to a consideration. If, however, the Government is sending out a notice that is so general in terms that it may comprehend everything and then intends to rely upon everything that may possibly be comprehended, then I have got to approach this case in quite a different attitude of mind and a very much more difficult one and not one as happy.

Mr. Clark: Will Your Honor excuse me just a moment? (Pause.)

The Member: Let that question go for the time being. Suppose you start with whatever opening statement you intended to make, Mr. Clark.

STATEMENT OF CASE ON BEHALF OF THE RESPONDENT.

Mr. Clark: My opening statement, Your Honor, will be very brief, indeed. I merely wanted to point out in addition to what I have already said, that it is the position of Respondent that Petitioner is a mere holding company under 104(b); that it has accumulated a surplus beyond the reasonable needs of the business; that it had in the taxable years here involved large cash balances in banks; that the amount of capital paid in was relatively small; that the surplus accumulated on that capital was approximately twenty-five to thirty times thereof; that a large portion of the Petitioner's earnings were loaned to the controlling stockholder during a long period of years; that a portion of the surplus funds were utilized in the purchase of securities from the controlling stockholder, enabling him to claim large losses on the individual income tax return; and that the controlling stockholder made a substantial gift in 1932 of an interest in Petitioner's stock only three days prior to the signing of the Revenue Act of 1932, which Act greatly increased surtaxes and placed a tax on gifts.

The Member: Greatly decreased, don't you mean? It would decrease.

Mr. Clark: Increase.

The Member: What do you mean? I don't understand that.

Mr. Clark: Well, there was in increase in surtax rates throughout the provisions of that Act. That is what I mean.

The Member: Yes, but do I understand you to say that this individual did this for the purpose of increasing his surtaxes?

Mr. Clark: No, indeed.

The Member: Well, that is what I thought you said. That

is the reason I didn't understand it. Give me the thought now.

Mr. Clark: Well; what he did was to make a substantial gift of Petitioner's stock, the Maine Company stock.

The Member: Yes.

Mr. Clark: By which he avoided an increase in surtaxes.

The Member: Oh, yes.

Mr. Clark: I am sorry I didn't make myself clear, Your Honor.

The Member: That is what I thought you meant.

Mr. Clark: Now, on those points Respondent in general relies. Other than that I have no further opening statement.

The Member: Mr. Welch said in the course of his statement, that he thought no one would contend that the Petitioner was formed for the purpose as outlined in the statute. Did he correctly say that as to your own attitude?

Mr. Clark: I think so, Your Honor. I would be definitely inclined to agree that as far as the formation of petitioner is concerned, it is not within the statute.

The Member: So that at least we can narrow the issue to the determination of whether or not this corporation was availed of to enable the shareholders to escape the application of the surtax.

Mr. Clark: Yes.

The Member: And the two subdivisions of the statute are regarded by the Commissioner as determining the 50 percent tax, namely, in that this is a mere holding or investment company, and, in addition to that, that its earnings were permitted to accumulate beyond the reasonable needs of the business.

Mr. Clark: Yes.

The Member: And is there any specification--

Mr. Clark: Yes, I think that is right, Your Honor. There are many facts which may be developed in support of that, but I think those are the two sections.

The Member: I am familiar enough with these cases to know that there are various diversifications of fact which might cause the statute to apply or not to apply, but I want to get it as definite when I start as I can.

Let me ask you again: Is it possible for the Government to specify section (b) of the statute as to whether it is regarded that the Petitioner here is a holding company on the one hand, or an investment company on the other? As you know, the Board has at one time talked about investment company. Some of the decisions talk about investment companies; some of the decisions talk about a holding company.

Mr. Clark: Yes.

The Member: And I would like to know, if I can, what the Commissioner thinks this is, if he has any thought on that subject at this time.

Mr. Clark: I don't think, Your Honor, that the Commissioner has any definite thought on that at this time. I wouldn't want to commit myself in that regard, because there is too much testimony that will come out. I couldn't say.

I have nothing further to say.

Mr. Welch: Does Your Honor feel that we should open the testimony now or do whatever may be done about the stipulation?

The Member: Well, I have no thought about it at all.

Mr. Welch: I am prepared—

The Member: Generally speaking, I shall conduct this hearing by sitting from 10 o'clock in the morning until a quarter of one, and then from a quarter after two until about four-thirty, with whatever adjustments there are

necessary by the exigencies of the trial. But that is my general purpose. Now, that means that we have half an hour left to utilize, if it can be utilized to advantage.

Mr. Welch: I am ready with witnesses.

Mr. Clark: But it would seem to me, Your Honor, with this stipulation still a bit in the air we ought to clean that up first and then we have the decks cleared.

The Member: Is that anything more than a mere formulation of facts which have been stated here?

Mr. Clark: Oh, yes, there is something more to it than that, and then we will be glad to go ahead this afternoon, so far as I am concerned.

The Member: Then we will suspend now until 2 o'clock this afternoon.

(Whereupon, at 12:15 p. m., a recess was taken until 2 p. m. of the same day.)

Afternoon Session.

The Member: You may proceed.

Mr. Welch: If Your Honor please, I am now ready to file the stipulation in this case (handing document to the Clerk):

The Member: It will be filed.

Mr. Clark: No objection.

The Member: It has been filed.

Have you both signed it?

Mr. Welch: Yes. And with it, two volumes and exhibits attached thereto; the first volume running from one to twenty-eight, and the second volume from twenty-nine to sixty-nine. I have no intention of reading the stipulation. It is pretty dull going.

May I ask Your Honor if it would be a convenience to file it in duplicate?

The Member: If you have an extra copy, I think it would be more convenient to have it. It is not necessary to file a duplicate set of exhibits, however.

Mr. Welch: Oh, no; we don't intend to do that. I thought you were referring, however, to exhibits that were introduced.

There will be some exhibits introduced from time to time in addition to the stipulation.

The Member: Yes, I know; I mean the stipulation exhibits, I think it is unnecessary to file a duplicate set of them, but I am glad to know you have them in case we need them so that I may ask for them.

Mr. Welch: Some witnesses will use the stipulation, and it will be a convenience just mechanically to have a second one so that Your Honor may follow that as the witness testifies, from time to time.

The Member: Very well.

Mr. Welch: At the moment, I will leave both of them here, two copies of the stipulation on file; one copy with all the exhibits and the second with exhibits in reserve if Your Honor feels at any time you want them.

Then, if I could, I should like to have what I call the family tree marked.

The Member: I wonder whether it would not be useful, and convenient, if you were to state briefly the contents of the stipulation so that we might be able to have in mind some idea of what the stipulation contained.

Is it simply a formal setting forth of the facts that you stated here in your opening statement as to the interrelation of these corporations, and their history, or does it go beyond that?

Mr. Welch: It goes beyond that, and I observe my friends at both tables smile when Your Honor suggests a short statement of what is in them.

They have in them, I should say, most importantly, the income statements and balance sheets of all the companies. These will be of interest, I am sure, to both sides.

In addition, they have, and this accounts for the bulk and enormous number of contracts and documents, for example, Your Honor will remember my mentioning contracts that were made with the packers this morning; those are in there. All sorts of documents which by any stretch of the imagination counsel on either side may want to refer to in argument or in briefs are there.

Nobody has any ambition, I think, that any one on your side of the desk should ever sit down and read it through. It is hoped that we will call attention from time to time to those parts of it that someone will need to look at, and, as I stated, I think, this morning, it is my personal belief that page after page may never be looked at by Your Honor, or any other Board member.

I don't know that there is anything to be gained by trying to tell you, beyond that, what is in it. It just has everything in that anybody on either side of the case thought that somehow or someway might become material. I do not think that is a very happy statement, but that is about the way it stands.

Then could I have the chart of the corporations that I have used marked as Exhibit 1,—if that is the numbering to be used?

The Member: Now these exhibits which are appended to the stipulation, I take it, have all been marked expressly with the term "Stipulation"?

Mr. Welch: Yes, they have the letter "S."

The Member: So that there is no—they are all "S" something?

Mr. Welch: "S-1," and so forth. Other ordinary ex-

hibits I had supposed would be marked numerically, beginning with "1."

The Member: Well, our common custom is to make all the Petitioner's exhibits with a number, consecutively, and all the Respondent's exhibits with a letter, and all joint exhibits with a letter and a number.

Now, you have got a letter and a number now which is called "S" something or other. Now, if—and it is "S" and "S" only, is it? It is not "SIGP"?

Mr. Welch: It is "S" only.

The Member: Well, as long as the record is clear, I want to be sure that those are stipulation exhibits. We will have to forego the use of the letter "S" in marking Respondent's exhibits.

Mr. Welch: I observe.

Could I then have the chart marked as an exhibit?

The Member: Let the chart be marked as Exhibit 1.

Mr. Clark: That may go in, Your Honor, except for this fact: I would like to call attention for the record to the fact that it is Respondent's understanding that the Pau Corporation, so-called, if I am pronouncing it correctly—it is on the right—and second therefrom, and which apparently is put in Chicago Stock Yards Company, was in its answer.

The Member: On the right? The Power Company?

Mr. Welch: It is here (indicating).

The Member: Did you say the Power Company?

Mr. Clark: Pau,—P-a-u.

The Member: Oh, oh, Pau Company. I thought you said the Power Company, and that would relate to the one on the left. Apparently we have got to be very careful now of our language because we are in a complex situation.

All right, now you are talking about the Pau Company. Now, what about that?

Mr. Clark: That that stock was owned entirely by Mr. Prince. Now, I understand that there will be oral testimony introduced to show the contrary to that, but I simply did not want it to appear from here, without comment, that that was owned by Chicago Stock Yards.

The Member: Well, as I understand it, this exhibit is not being—this chart is not being offered as an exhibit as proof of all the facts that are stated in the exhibit, but only as some aid to the Board in getting a visualization of the inter-relation of these corporations, one with another. Is that correct?

Mr. Welch: Precisely. We felt—.

Mr. Clark: If that is so, then I haven't any further comment.

The Member: Very well. Let it be marked as Petitioner's Exhibit No. 1.

[The document referred to, so offered and received in evidence, being a chart, was marked "Petitioner's Exhibit 1," and made a part of this record.]

Mr. Welch: Well, as Exhibit No. 2, I should like to put into evidence the lease of the Railway, which I mentioned in my opening, which is the lease to the New York Central Railroad Company. It has been kept outside of the stipulation, or, more accurately, the exhibits attached to it, purely because of its bulk, and it is agreed by Counsel that we would offer it separately, and I now offer it.

Mr. Clark: No objection.

The Member: Received as Petitioner's Exhibit No. 1.

[The document referred to, so offered and received in evidence, being a lease to the New York Central Railroad Company, was marked "Petitioner's Exhibit 2," and made a part of this record.]

Mr. Welch: Mr. Leonard.

Shall we swear all of the witnesses all at once or one at a time?

Mr. Clark: Just a moment, if Your Honor please. Mr. Pierson wants to make a statement.

Mr. Pierson: By agreement of Counsel, Your Honor, and in addition to the facts as they have been stipulated, there are one or two more facts which I will read into the record, and I understand it is agreed to by Counsel on the other side.

In 1925 the Maine Company acquired the 1552 shares of C. M. D. Company issued to Armour & Company for $500,000. The Maine Company sold the 1552 shares in 1930 for $26.92.

The Member: Just a minute. Aggregate or per share?

Mr. Pierson: No, aggregate. The balance of the cost was charged off the books of the Maine Company at the time of the sale.

The Member: Is that agreed, Mr. Welch?

Mr. Welch: That is agreed.

The Member: Now, one more thing: I want to get the machinery of this trial simplified.

Customarily we want to restrict the examination of any one witness to one counsel on either side so that there will be no conflict and no confusion about that, and I will ask you all to bear in mind it is going to be confusing when you have several counsel on each side, anyway, and not have that confusion to exist any more than possible.

Mr. Clark: That, however, will not preclude conference between counsel, will it?

The Member: Oh, no. If the time comes when you get this huddle system to an exasperating point, I will have to stop it, but until that time comes you can handle your affairs any way you want to.

Are you ready to call your witness?

Mr. Welch: I am.

Mr. Leonard.

EVIDENCE ON BEHALF OF THE PETITIONER.

Thereupon, the Petitioner, to maintain the averments of its petition, introduced the following proof:

ARTHUR G. LEONARD,

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Welch). Your name, Mr. Leonard? *A.* Mr. Arthur G. Leonard.

Q. 2. Where do you live, Mr. Leonard? *A.* Chicago.

Q. 3. What do you do? *A.* I am president of the Union Stock Yards and Transit Company.

Q. 4. Are you also a member of its board of directors? *A.* I am.

Q. 5. Are you connected with any of the other companies that go to make up the enterprise? *A.* I am.

Q. 6. With what other companies and in what way? *A.* I am president of the Chicago Junction Railway Company and president of the Chicago Junction Railroad Company. I am a trustee of the Central Manufacturing District—

Mr. Clark: Just a moment, gentlemen; this is moving too fast for me to keep track, if you don't mind.

Mr. Welch (Addressing the witness). My brother, Mr. Clark, finds it a little difficult to go as swiftly as you are.

The Member. Mr. Clark, I am afraid we cannot let this go as slowly as that.

Mr. Clark: Very well.

Q. 7. (By Mr. Welch). Have you told us all the companies you are connected with, sir? *A.* I am president of the Produce Terminal Company and also president of the —I guess that's all.

Q. 8. I think you started to say something about Central Manufacturing District. A. I am trustee of the Central Manufacturing District.

Q. 9. How about the New Jersey Company? A. I am a director in the New Jersey Company.

Q. 10. Did you hold these same offices and have the same duties in 1930, 1932, and 1933 that you now hold, and have? A. I did.

Q. 11. Directing your attention to the Transit Company, what does that company do? A. Union Stock Yards and Transit Company conducts the business of managing of the yards.

Q. 12. That is the stock yards? A. The stock yards proper.

Q. 13. And what are your duties in connection with that company? A. Well, I am in charge and responsible for the direct operations of that company.

Q. 14. When did you first become connected with the stock yards? A. In 1899.

Q. 15. And in what capacity, Mr. Leonard? A. I went there as general manager under the then president, Mr. J. A. Sporr.

Q. 16. What had been your business experience prior to that time, Mr. Leonard? A. I have been connected with the New York Central in the operating department in an executive capacity.

Q. 17. Did that experience have anything to do with your going to the stock yards? A. It did.

Q. 18. What did it have to do with it? A. Well, one of the principal enterprises of the stock yards at that time when I went there was the management of the Chicago Junction Railway. I went there practically to manage and direct that part of the live stock business.

Q. 19. Incidentally, Mr. Leonard, I think you prefer that

I do not ask you how old you are, is that right? A. That is right.

Q. 20. Well, will you tell me, Mr. Leonard, whether or not when you went out there you informed yourself as to the history and development of the stock yards? A. I did.

Q. 21. Would you tell us, Mr. Leonard, as shortly as you reasonably can, what had been the history and development of the yards? A. Well, the Chicago Stock Yards and Transit Company was organized by the railroads in 1865. Prior to that time there were a number of smaller yards in Chicago; also a number of yards that were connected with the railroads. Each railroad had endeavored to have its own stock yards. These yards were all ill eqüipped, small and inadequate. There was no central place where all of the live stock could be sent so as to develop a real market for live stock.

Mr. John B. Sherman, who owned the Sherman Yards at Thirty-first Street and the Lake, induced the railroads to get together and organize a union as Central Union Stock Yards, and also to build a belt line to connect these yards with the various railroads. This belt line was known as the Inner Belt. At that time land was purchased on the site where I now do my work. A charter was obtained from the Legislature of the State of Illinois authorizing the incorporation and operation of a stock yards, and it has been a stock yards in continuous operation there, to this day. They also authorized the construction and operation of a railroad, and that road is still in operation today.

Mr. Welch: Could I see the charter a moment, Mr. Green?

(A document was handed to Mr. Welch.)

Q. 22. (By Mr. Welch). I have here, Mr. Leonard, as S-1. of the exhibits attached to the stipulation, a copy of that charter of the original Stock Yards Company. Does that

check with your recollection of what you have just told us? A. Yes, it does.

Q. 23. Could I ask you, Mr. Leonard, if there was anything about that charter that was early called to your attention? A. There was.

Q. 24. And what was that? A. That was—you will find some place in that charter a clause limiting the borrowing power of the corporation to $500,000.

Mr. Welch: Without bothering to read it, I will call Your Honor's attention to the fact that it is section 10 of the charter.

Mr. Clark: I am sure Mr. Welch doesn't want the witness to characterize this. He is just saying this was called to his attention.

Mr. Welch: Yes.

Mr. Clark: Do you intend to go any further than that?

Mr. Welch: No, no. I have said all I intend to say about it at this point.

Q. 25. (By Mr. Welch). I should like to ask this witness if the limitation on borrowing power has ever been changed?

Mr. Clark: Well, of course, to that I would object.

Mr. Welch: That seems to me a material fact.

The Member: You object? Why?

Mr. Clark: Because if there have been any changes, it should be proved by documentary evidence, Your Honor.

Mr. Welch: Well, you see, the proof of a negative by documentary evidence is difficult.

The Member: The objection is overruled. The witness may answer the question.

Mr. Clark: May I have an exception to that?

The Member: Yes.

Q. 26. (By Mr. Welch). Has that provision in the char-

ter limiting the borrowing power ever been changed, Mr. Leonard? A. It has not.

Q. 27. Mr. Leonard, when you arrived in Chicago, was there only one corporation then in existence, or was there more than one? A. Oh, there were three corporations in existence.

Q. 28. And what were those three? A. The Union Stock Yards and Transit Company, the Chicago Junction Railway Company, and the Union Stock Yards—the Chicago Junction and Union Stock Yards, which we commonly term the Jersey Company.

Q. 29. Those three were then in existence? A. Those three were then in existence.

Q. 30. What was then the relation of the Jersey Company to the others? A. Well, the Jersey Company owned all of the capital stock of the Railway Company, and at that time it had over 98 percent of the capital stock of the Transit Company.

Q. 31. Are you familiar, Mr. Leonard, with the history of the formation of this New Jersey Company? A. I am.

Q. 32. Will you tell us shortly just what the history of the formation of that company was? A. Between 1865 and 1890 the Chicago Junction—the Union Stock Yards and Transit Company had become a very successful corporation. It was a central and the largest stock yards in the United States. At that time the railroads did not run through Chicago, nor do they to this day. The Transit Company after it had become—after they had organized it, built a railway which was called the Inner Belt to connect the Chicago Stock Yards with the various railroads in Chicago. After the Transit Company had been formed, it operated these railroads until 1897, and in 1897 it leased to its railway operations—leased its railway operations to the Chicago & Indiana State Railway. That was known as

The Inner Belt. At the same time, the Jersey Company had caused to be organized an Outer Belt known as the Chicago, Hammond & Western Railroad. In 1898 both these roads were consolidated into the Chicago Junction Railway, and the Jersey Company owned the entire stock of the Chicago, Hammond & Western, and also had the lease of the Chicago Junction Railway—lease of the Chicago & Indiana State Line Railway.

Q. 33. Mr. Leonard, I was directing your attention more closely at the moment to the formation of the Jersey Company and the reasons that led to its formation, and so that you will know what I am talking about, may I ask you whether or not there had grown up between 1865 and 1890 a large packing industry near the stock yards? A. There was a very—the packers naturally clustered about the stock yards, and where there was a large amount of live stock ready for slaughter. Naturally, there was excellent shipping facilities at the yards for the packers to ship out their finished product to the East, and the—

Q. 34. Could I direct your attention to the map for a moment and have you point out to us where the stock yards are and where the packers were? Can you see it from where you are, Mr. Leonard? A. I can.

Q. 35. Is this yellow portion on the map the stock yards, itself? A. The stock yards proper, yes.

Q. 36. And just to the west of it in these various colors is what? A. Packingtown.

Q. 37. And by "Packingtown" what do you mean? A. I mean that is where all of the packers have their plants, nearly all of them, not all.

Q. 38. Yes.

Now, between 1865 and 1890—strike that out. Is the period between 1865 and 1890 the period during which Packingtown grew up? A. Yes.

Q. 39. As a consequence of the packers moving there and getting their plants located there, did something happen in 1890 in respect to the possibility that they might move away? *A.* Well, in 1890 the packers had asked for a division of the spoils, or some of the gravy, as they termed it, at the time, and said unless they got some of this gravy they would move to other quarters. They purchased in Indiana a large tract of land and developed it at a cost of about a million quarters. They made a great noise about it, this purchase, and said that that was where they were going to go. About this time they also instituted several lawsuits. One was to compel the railroads to handle their freight without charge. The other was to have the stock yards declared a nuisance. In short, the whole thing developed into a big poker game for large stakes. The Transit Company didn't have sufficient funds to sit in this game because of the limitations that had been imposed upon it by the charter to $500,000. This $500,000 was only half of what the packers had put in as an ante for the Indiana land, and at that time the Jersey Company was formed. It had ample borrowing power and could raise the funds necessary to pay the packers the large amount that they were demanding as a bonus. In 1890 the Jersey Company had secured over 98 percent of the capital stock of the Transit Company. They raised the large sums of money and paid the packers the bonus and obtained from the packers a contract for them to remain there for 15 years.

Q. 40. Now, at that time, that was 1890 to 1892, was it not? *A.* Yes.

Q. 41. Were there a great many people working around the stock yards? *A.* There were a great many people working around the stock yards.

Q. 42. How did they get to work in those days? *A.* Well, they came by horse car, they came afoot, and by horseback.

Q. 43. Now, did something happen about 1902 which affected the whole railroad system in Chicago? A. Yes.

Q. 44. What was that, Mr. Leonard? A. Well, that was the Common Council of Chicago had passed an ordinance requiring that all the railroad tracks in Chicago, the City of Chicago, be elevated. That struck the Transit Company as well as the other Railroad Companies, and they were compelled to elevate the tracks, the freight tracks, of the road that they had leased.

Q. 45. Now, in connection with that elevation, was some thought given to building an elevated passenger line? A. There was. When the freight tracks were elevated, there was consolidated with the elevation of the freight tracks an elevated railway to carry passengers.

Q. 46. And is that a passenger line that now runs into this district? A. It is.

Q. 47. And, pointing to this map, Mr. Leonard, can you see from there (indicating)? A. I can see it.

Q. 49. Well, I congratulate you, sir. Is this line that I am now following a somewhat blue line? A. Well, that —that line is a—is of the older elevated type, the line to the west, the right from where I am sitting here was the freight tracks going out to the west, that of Illinois Central on the lake shore.

Q. 50. Going to the east, were they not? A. East, rather, yes.

Q. 51. This blue line comes in— A. It runs—

Q. 52. —through the stock yards, past the administration— A. Past the administration, through the stock yards, and runs around as a single track around the loop, around Packingtown.

Q. 53. Around Packingtown and back? A. Yes.

Q. 54. Now, Mr. Leonard, at the time of the erection of that elevated passenger line, when that was determined on,

was some estimate made of the probable cost of it? A. There was.

Q. 55. Do you remember, approximately, what the estimate was? A. It was about—it was $2,327,000.

Q. 56. Did the Transit Company at that time have sufficient funds on hand to build that line? A. No, it did not.

Q. 57. Could it borrow it? A. No, on account of the limitations in the charter.

Q. 58. Well, what was done, how was it gone about? A. Well, they organized the Chicago Junction Railroad Company.

Q. 59. Railroad Company? A. Railroad Company.

Q. 60. Yes. A. And obtained a charter from the State of Illinois to operate a railroad—to operate a railroad.

Q. 61. Well, when that company was formed, could it borrow money on its own credit? A. It could not.

Q. 62. Well, how was that difficulty met? A. They issued bonds of the Chicago Junction Railway—Railroad; that was guaranteed by the Jersey Company, which had a good credit.

Mr. Welch: Shall we call attention, Mr. Green, I think to the Exhibit "S-11."

Mr. Green: You have got it up there, Mr. Welch.

Mr. Welch: Oh, I beg your pardon.

We are all ready for it.

Q. 63. (By Mr. Welch). Calling your attention to S-11 of the exhibits attached to the stipulation—A. Yes.

Q. 64. —to the number I am now pointing to. A. Yes.

Q. 65. Is that the indenture to which you have referred? A. That is the indenture, yes; first mortgage.

Q. 66. Now about the time this happened was something done about a lease of this line? A. Yes. A lease was negotiated with the South Side Elevated Railroad which connected with all of the—pretty much all through Chicago.

Q. 67. Calling your attention to S-10 attached to the stipulation, is that this lease to which you have referred? A. To the South Side Elevated Railroad, yes.

Q. 68. Now, without plowing through the lease, is it correct, Mr. Leonard, that the rental to be paid under the lease was taxes and interest on the bonds that you have talked about? A. Yes.

Q. 69. Is that all the rental that was to be paid? A. That was all the rental that was to be paid.

Q. 70. Now, Mr. Leonard, did the new structure get built within the estimate that you have told us was made? A. No.

Q. 71. It cost more, did it? A. It cost more money.

Q. 72. Where did the additional money come from? A. Partially from the Jersey Company and partially from the Chicago Junction Railway Company which was authorized by the Jersey Company.

Q. 73. Now, you spoke of the fact that the Jersey Company guaranteed that bond issue. A. I did.

Q. 74. Has the Jersey Company ever been called upon to pay anything under that bond issue or by reason of it? A. It has.

Q. 75. What, to what extent? A. Well, in 1932, 1933, the South Side Elevated went into the hands of a receiver. They failed to pay their rental, and the Jersey Company, as guarantor, came forward and paid the rental and the last two years has been paying its taxes.

Q. 76. Now, may I ask you, Mr. Leonard, whether or not in 1932 and 1933 you could see any prospect that the Railroad Company would ever be able to meet this bond issue? A. No.

Q. 77. Mr. Green calls my attention to the fact that in the answer to the second preceding question you said that

the Jersey Company had paid the rental on the— A. I meant the Maine Company.

Q. 78. Did you mean rental or taxes? A. No, I meant rental. The rental had been defaulted by the South Side Elevated Railroad and the Jersey Company had guaranteed the bonds, and when the interest on the bonds came due, why, then, it paid the interest on the bonds.

Q. 79. I see. I think that is clear. Now, Mr. Leonard, I think you said at the outset of your testimony that you were president of the Stock Yards Harness and Saddlery Company; that is true, is it not? A. Yes.

Q. 80. Will you tell us about when that was formed, and why? A. Well, that was formed about 1903. At that time we were doing a very large horse business and it thought that the harness end of it could be developed into a profitable enterprise, but the automobile came around and killed it.

Q. 81. Now, at some time did the Transit Company go into the business of manufacturing steam and water, light and power, or distributing them? A. It did.

Q. 82. When did it first do that, Mr. Leonard? A. That was early in the game we did that.

Q. 83. Quite early in its history? A. Yes.

Q. 84. At some time did it begin to expand those activities so that it furnished these things to other companies? A. Yes.

Q. 85. As time went on what happened to that business? A. It developed into a rather large business; not alone did we furnish the light and power and heat to the Stock Yard Company, but also to Packingtown and to most of the occupants of the Central Manufacturing District, but in 1915 the State Utility Commission compelled us to incorporate and take out an incorporation and come under their jurisdiction.

Q. 86. So as a consequence of that Produce Terminal Corporation was incorporated and formed? A. Yes.

Q. 87. Who owned its stock, when it was formed? A. The Transit Company.

Q. 88. Who owns its stock, today? A. The Maine Company.

Q. 89. Now, may I take up with you, Mr. Leonard, the Central Manufacturing District.

You said, I think, you were one of its trustees? A. I am.

Q. 90. And how long have you been such a trustee? A. Since 1909.

Q. 91. Will you tell us what the Central Manufacturing District is? A. Well, it is the property just north and northwest of the stock yards.

Q. 92. Just wait a moment, if you will, Mr. Leonard, so that we can point it out on the map. A. Yes.

Q. 93. Here, I think— A. No.

Q. 94. Here are the stock yards (indicating on map). A. Those are the stock yards.

Q. 95. And here, in this colored portion with railroad lines all through it, is the manufacturing district, is it not? A. Central Manufacturing District, yes.

Q. 96. Also extending out here (indicating). A. Yes, along Pershing Road.

Q. 97. Would you mind, Mr. Leonard, giving us some idea of distances on this map? Take the stock yards, themselves. A. The stock yards run from Forty-seventh Street to Thirty-ninth Street, and that is a mile long.

Q. 98. A mile long? A. Yes, and the width of the stock yards there is a half mile.

Q. 99. Incidentally, this map appears to be blank around the stock yards. As a matter of fact, it is all densely built up, is it not? A. Oh, yes.

Q. 100. All around? A. Densely built up; yes, sir.

Q. 101. Did you tell us, for the record, what the Central Manufacturing District has become, what it is now? *A.* To the north and northwest and adjacent to the yards is what we call the Central Manufacturing District. It was formerly vacant land, there, and we felt it would be a wise proposition to develop that land into a Central Manufacturing District to get tonnage and, consequently, revenue for the Junction Railway. This was developed and carried on for that purpose.

Q. 102. And the shares of the trust are owned by whom? *A.* Accordingly, at the time the Jersey Company had formed a trust that is known as the Central Manufacturing District, and they own the shares of the trust.

Q. 103. Meaning by "they," whom, the Jersey Company? *A.* Yes, Jersey Company.

Q. 104. Did the District develop through the years as a good producer of tonnage? *A.* Oh, yes.

Q. 105. To what extent, Mr. Leonard? *A.* Well, it developed to a very great extent. In fact, to my mind it has always been the reason the New York Central was willing to pay a rental of $2,000,000 a year for the lease of the road, which was made in 1922, was by reason of the tonnage which had been developed in the Central Manufacturing District.

Q. 106. Now, Mr. Leonard, may I ask you when you first came to know Mr. Frederick H. Prince? *A.* In 1914.

Q. 107. Had you ever met him before then? *A.* No.

Q. 108. Who, at that time, when you first knew Mr. Prince, was in charge of operations in Chicago? *A.* Mr. J. A. Sperr.

Q. 109. Who was the president of the Transit Company? *A.* President of the Transit Company at that time.

Q. 110. Was he a man of marked ability? *A.* He was.

Q. 111. How long did he continue to be in charge out

there? A. He was taken ill in 1925 and died in 1926, and he was in charge until practically 1925.

Q. 112. Now, will you tell us in a general way what the relations were between you men in the West in the operating companies and the Maine company in the East, prior to Mr. Sporr's death? A. Well, at that time, practically, Mr. Sporr and I ran the stockyards. We made money; paid it out in dividends; sent reports of what we had been doing to F. H. Prince & Company of Boston.

Q. 113. Would you say that you had a distinctly free hand out there? A. We had a distinctly free hand there.

Q. 114. What personal contact, if any, was there between you men in the West and the officers of the Maine Company in the East, up until Mr. Sporr's death? A. Well, the only contact was through Mr. Sporr.

Q. 115. Would he come East sometimes? A. Oh, frequently.

Q. 116. Did anybody from the Maine Company come west during that earlier period? A. No.

Q. 117. Now, what you say, I suppose, about the relations between the Maine Company and you men in the West would apply to the Transit Company; is that right? A. That is right.

Q. 118. And to the Railway Company? A. And to the Railway Company.

Q. 119. Would it also apply to the Railroad Company? A. And the Railroad Company.

Q. 120. How about the Manufacturing District? A. Well, that was somewhat exceptional because the bonds that had been issued by the Central Manufacturing District were guaranteed by the Jersey Company, and when we sold any property or lease with an option in it to buy, why, we had to send those papers down to New York and obtain a release from under the general mortgage.

Q. 121. Yes. Well, except for that did you have quite a free hand? A. Entirely free hand in the District.

Q. 122. How about Produce Terminal? Did you have, similarly, quite a free hand? A. Oh, absolutely. That was primarily my baby.

Q. 123. Now, was there some change in this situation about the time of Mr. Sporr's death? A. Yes.

Q. 124. What change was there? A. Well, the change was that the Maine Company had come in—the officers of the Maine Company came west quite frequently.

Q. 125. Did somebody go out to the Board out there? A. Sir?

Q. 126. Did somebody go on to the board of directors? A. A Mr. Prince, who was president of the Maine Company, went on as chairman of the board of the Transit Company.

Q. 127. Did representatives of the Maine Company now begin to come West? A. Oh, they came West with increased frequency and gave orders and directions what to do. We might send suggestions to the East, and they might come back in the form of an order.

Q. 128. And they might not? A. And they might not.

Q. 129. Now, take by 1930 to 1933, what was the relationship by that time? A. Well, the Maine Company was practically in the saddle, and I was about the hired man, I guess, you might say, and the orders came from the East and told us what to do and how to do it.

Q. 130. Was there any daily contact between— A. Oh, yes, there was.

Q. 131. Was there any daily contact between you men that were running the Transit Company and Produce Terminal and the District with the officers of the Maine Company? A. There was.

Q. 132. How was that contact? A. Telephonic.

Q. 133. And how often? A. Oh, frequently, many times a day.

Q. 134. Now, could you give me, Mr. Leonard, some examples of things that would be decided or handled by the Maine Company in the years '30 to '33? A. Well, during those years we had the banking crisis in Chicago, and the Transit Company and the various affiliate organizations were badly affected, and the Maine Company, or the easterners, handled the entire situation.

Q. 135. During this period, 1930 to '33, what would be the situation in case of changes in personnel out there in Chicago? A. Well, we would, if there was any of the principal officers, we would submit the names of successors to the East and for their approval.

Q. 136. And were the ultimate appointees chosen by you in the West or by the Maine Company? A. They were chosen by the Maine Company.

Q. 137. How about dividend policies? A. Oh, they were —they were decided by the Maine Company, what to do and what dividends to pay.

Q. 138. Did the Maine Company in those years have anything to say about where your funds were kept? A. Yes.

Q. 139. What did they have to say? A. They indicated the banks in which the funds should be deposited.

Q. 140. Now, you have authority, I take it, to sign checks, Transit Company checks, do you not? A. Oh, yes.

Q. 141. Is it within your power to draw a check for any sum that is in the bank, if you wish to? A. Yes.

Q. 142. Will you tell His Honor as a practical matter how you exercised that power? A. Well, anything that for large sums that the Maine Company are familiar with as we go along in a daily routine, why, we don't consult them for the payment of those—the issuance of those checks,

but any unusual large amount for—we would consult the Maine Company and obtain the authority.

The Member: Wait just a minute. Will you read that answer? (Answer read.)

The Member: You mean that the size of the sum had nothing to do with it; because of these large sums in the first—

The Witness: Oh, no.

The Member: —part of your answer?

The Witness: Oh, no.

The Member: And that large sums in the second part—

The Witness: No, that was routine.

The Member: The distinction was whether it was unusual or not.

The Witness: Unusual, yes.

The Member: Oh.

The Witness: But the daily trend, why, then, we issued them.

The Member: Irrespective of how large the sum might be.

The Witness: Well, we were—

The Member: If it is small or ordinary sum, or ordinary occasion, you would not—

The Witness: Well, we paid one freight bill for one week's freight of $975,000.

Q. 143. (By Mr. Welch). And I take it, as to a freight bill, you would never ask the Maine Company for any authority? A. Oh, no, because that is a matter of routine, as it goes along.

Q. 144. On the other hand, if you had something out of the regular course of business, even in a much smaller sum, if it was out of the regular course of business— A. Oh, yes.

Q. 145. —then what? A. Yes, indeed, then we applied to the Maine—

Mr. Clark: Just a moment. You have been doing a lot of leading here. Please put the questions properly.

Mr. Welch: I did not think I had been doing a lot.

Mr. Clark: Well, it seemed so.

Mr. Welch: If I have sinned, well, I will try to—

Mr. Clark: I do not mean to interrupt too much on this routine examination.

Q. 146. (By Mr. Welch). Did you at some time, some years ago, have a serious fire out there? A. We did.

Q. 147. Will you tell us what the extent of it was, and again I will go to the map and point as to what you say to us. Where did it start? A. It started in the southwest corner of the yards, right down below there.

Q. 148. (Indicating on map.) A. A little further down, right down there.

Q. 149. Somewheres near the letter "C" and cattle pens on this map? A. Well, it is just south of the Armour office there.

Q. 150. O. K. I think we have it. A. Yes, just south of there, it started.

Q. 151. And burned— A. And then it went up northwest.

Q. 152. Northeast? A. And destroyed all the pens—no, further—northeast (indicating).

Q. 153. Northeast (indicating)? A. Northeast. I said west.

Q. 154. Yes. A. And destroyed all of the pens there, destroyed the row of horse barns, the amphitheater, the hotel, and a great many of the other buildings, and then gutted our Exchange Building, our office building.

Q. 155. Incidentally, what kind of a building is your office building? A. It is a concrete building.

Q. 156. How large, how many stories? A. Eight stories.

Mr. Welch: Will you permit me to lead on this?

Q. 157. (By Mr. Welch). A fairly large office building, I take it? A. It is a very large office building.

Q. 158. So, then, pointing again to the map (indicating), the fire began somewheres in this section, in the vicinity of this letter "C,"—you may not be able to see. A. Yes.

Q. 159. And burned straight out in a northeasterly direction? A. Out to Halstead Street, yes, destroyed the bank building.

Q. 160. Did anyone from the Maine Company appear? A. Yes.

Q. 161. When the fire happened? A. Yes, Mr. McDonough came down the second day, and Mr. Prince—or the first day—and Mr. Prince was there the second day.

Q. 162. I think that is the first time we have had Mr. McDonough's name. Who is he, sir? A. He is the vice-president of the Maine Company.

Q. 163. And is assistant to Mr. Prince? A. And assistant to Mr. Prince, yes.

Q. 164. After that fire did problems arise as to what you would be—as to what would be rebuilt? A. They did.

Q. 165. Who dealt with those problems? A. Mr. Prince and I.

Q. 166. Well, what did Mr. Prince do,—what was— A. Well, he indicated that the buildings should be rebuilt, and what we should do in a general sort of a way.

Q. 167. How about carrying out his orders? A. They were carried out, obeyed implicitly. Mr. Prince even suggested that nothing but common bricks should be used in our amphitheater.

Q. 168. Am I correct in thinking that you hoped for something else? A. We did,—ha! ha!

Q. 169. Now, may I ask you whether or not from 1931 on, say through 1933, any suggestions of yours have been turned down by the Maine Company? A. Yes.

Q. 170. Can you give us a sample of suggestions that you have made that have been turned down? A. Well, in 18—in 1935, I suggested that—

Q. 171. In what year, sir? A. 1935—or 1933.

Q. 172. You are about to speak of some hog houses, are you, sir? A. Yes.

Q. 173. And the year, I think, was what? A. 1933.

Q. 174. All right, go ahead. A. Yes, 1933.

I wanted to build hog houses of concrete. I asked for two million, and I was turned down.

Q. 175. Did you, at that time, have any conversation with any representative, anybody in the Maine Company, about these hog houses? A. I did.

Q. 176. With whom did you have such a conversation? A. Mr. Prince.

Q. 177. Where did that take place? A. In Chicago.

Q. 178. On what occasion? A. On the occasion of a visit that he was making there, a trip that he made there.

Q. 179. Now, will you tell His Honor, in substance—

Mr. Welch: Could I interrupt just a moment? I am wondering if there is provision for Counsel to have any water?

The Clerk: Yes, I will take care of it.

Mr. Welch: Your Honor made me think of it.

The Member: Can you go ahead until you get it?

Mr. Welch: Yes; thank you, sir.

Q. 180. (By Mr. Welch). You spoke of having a conversation with Mr. Prince. *A.* Yes, I did.

Q. 181. In respect to these hog houses. *A.* In respect to the hog houses.

Q. 182. Will you tell His Honor the substance of what was said by you, and the substance of what Mr. Prince said to you in response. *A.* Well, I was urging upon Mr. Prince the serious necessity of building fire-proof hog houses, and fire-proof sheep house, and Mr. Prince said: "Well, Mr. Leonard, why, I cannot possibly let you have any such sum of money as that now. I have got a very, very large sum of money to raise to pay off the indebtedness of 1940. I know that you would like to have the hog houses; I am perfectly willing to have you have them, but until after 1940, nothing doing."

Q. 183. Did you at such time have some similar project about some sheep houses? *A.* I did.

Q. 184. Did you also have a discussion with Mr. Prince about those? *A.* I did.

Q. 185. Will you tell us, in substance, what you said then, and what he said? *A.* He practically repeated the same conversation, but emphatically said: "Don't ask me for any money until the indebtedness is paid off in 1940. Come to me after 1940 and I will talk it over with you."

Q. 186. Now, taking the last ten or fifteen years, Mr. Leonard, what would you say has been the policy of the Maine Company with you on the point of maintenance and improvements out there? *A.* I say it has been niggardly.

Q. 187. Have you at any time said anything about that? *A.* I have told Mr. Prince that.

Q. 188. What did he say when you told him that? *A.* He said: "I know you feel that I am skinning all the money from you, and not giving you what you would like to have, but until this indebtedness is paid"—in short, that was the

burden of his song—he must pay this indebtedness in 1940 and—.

Mr. Clark: Just a moment. Is Mr. Prince here?

The Witness: Sir?

Mr. Clark: Is Mr. Prince here?

Mr. Welch: He is not in the courtroom.

Mr. Clark: Is he supposed to testify as to any of this conversation himself?

Mr. Welch: I do not know why I should answer at the moment. That has nothing to do with its admissibility.

The Witness: I am under oath.

Mr. Clark: Well, I won't object.

Q. 189. (By Mr. Welch). On how many occasions, Mr. Leonard, would you say that Mr. Prince has discussed with you his need for funds in 1940? A. Oh, on numerous occasions.

Q. 190. Did he ever tell you anything about the sum that he would need? A. Oh, yes.

Q. 191. What did he tell you about that? A. He said he required 28 millions for 1940.

Q. 192. Now, Mr. Leonard, during the last 10 years or so, what has been the trend of the volume of business in the stock yards? A. Well, we have had a drouth in the west, and it has decreased, to some extent,—decreased all over, but we are particularly suffering from what we call the direct buying, where they avoid the yards.

Q. 193. Well, I think you will have to explain that a little,—how direct buying does avoid the yards, as you put it. A. Well, Swift & Company, for instance, has a small yard down at Halstead Street, and the river—at Halstead Street—they buy direct in the country and ship to the small yard and truck them out to the plant, and avoid the yards.

Q. 194. And avoid the yards entirely? A. And avoid the yards.

Q. 195. And, I take it, that the way the Transit Company makes money is by having stock go through its yards; is that right? A. Yes, sir.

Q. 196. What effect does this practice of Swift & Company have on the farmers who produce live stock? A. Well, I feel eventually it is going to prove disastrous to the farmer that raises and feeds live stocks. The stock yards is doing a marvelous work, I feel, in maintaining a wonderful, free, and competitive market for live stock. It is the largest live stock market in the world. It is a point where the greatest demand that exists anywheres in the whole world for live stock is met by a supply from the country. There is a large number of commission men in the yards that serve the producer with a fidelity that is beyond question. If such a yards is to continue and is served as it is served today, then the farmer will get a fair price for his live stock and they will be well handled and will be weighed by an independent source, but if these yards diminish or disappear, then the farmer is confronted with a very, very serious proposition. The only place he can send his live stock to is the packer and when the packer handles them and the packer weighs them and the packer puts the price on them, then the farmer is lost.

Q. 197. Now, did I understand you to say that Swift & Company has been for some time bringing in these "directs," as you call them? A. They have.

Q. 198. Now, at some time did Armour & Company threaten to do what Swift & Company is doing? A. They did.

Q. 199. When was that? A. In 1932 or 1933.

Q. 200. Did Armour & Company carry out these threats? A. They did not.

Q. 201. Do you know what put a stop to them? A. I do

Q. 202. What was it? A. Mr. Prince bought into Armour & Company and became Chairman of the board.

Q. 203. And then the threat ceased; is that correct? A. Well, they didn't put it into effect.

Q. 204. Then do I gather that Mr. Prince's buying into Armour & Company has had some beneficial effect upon the stock yards? A. Yes, indeed.

Q. 205. How would you say it has? A. Well, Armour & Company today are good for 250,000 a year yardage on directs. Swift & Company are not good for 5,000.

The Member: What does that mean? I don't understand that.

The Witness: Well, directs are purchased in the country and then they are sent into the yards. Swift & Company avoid sending his into the yards by sending them down to this little place at Halstead and the river, and then he uses trucks to bring them into the yards. Armour sends his direct into the yards and pays yardage on them, and that amounted, in 1937, to $250,000.

The Member: Two hundred and fifty thousand dollars?

The Witness: Two hundred and fifty thousand dollars; yes, sir.

The Member: I was only seeking to find out what it meant by Armour & Company being good for 250,000 and Swift & Company being good for only 5,000.

The Witness: Yes.

The Member: I think I understand now.

The Witness: I beg your pardon. I didn't make myself clear.

The Member: You mean by that that Armour & Company do, in fact, bring in $250,000 worth of cattle while Swift & Company bring in only $5,000?

The Witness: Yes, sir.

The Member: Into the stock yards.

The Witness: Into the stock yards; yes, sir.

Mr. Welch: Well, I am not sure. As I understand his testimony, they bring in—

The Member: Don't you tell me about his testimony but go on question him and clear it up as you will.

Q. 206. (By Mr. Welch). Do you mean, Mr. Leonard, that they bring in $250,000 worth of cattle or enough cattle to produce— *A.* That is, enough cattle to produce yardage. That is the yardage that they pay on. We only collect yardage, and they pay yardage.

The Member: Two hundred and fifty thousand dollars yardage charges of yours?

The Witness: Yes, sir.

The Member: Is that what you mean?

The Witness: Yes.

The Member: As against $5,000 paid by Swift & Company to you?

The Witness: Yes, sir.

The Member: In yardage charges?

The witness: Yes, sir. Yes.

Q. 207. (By Mr. Welch). Now, Mr. Leonard, from your experience over the years in the stock yards, can you see any serious demands for money that may be made on the Transit Company in the future? *A.* Well, naturally, where one has such a large enterprise, you can think of many things. For instance, a cloudburst, or take a tornado like went through New England in September last or October last. That gave them a wallop. And the depression, when the bank moratorium was declared, the Transit Company got an awful wallop at that time.

Q. 208. Yes. Were these possible needs for money in the future in your mind as possible needs in the years 1930 to 1933? *A.* Yes.

Q. 209. Now, how about your situation if you had a boom?

How would you be fixed? A. Well, our plant isn't adequate to take care of a very large increased supply. We would have to make pretty heavy expenditures to meet any sort of a boom.

Q. 210. Now, taking the years 1930 to 1933, what resources were available to you to which you could turn if you had to meet any of these needs that you have described to us? A. Oh, the only resource that we have would be the Maine Company.

Q. 211. Have you ever resorted to the Maine Company? A. Yes, we have.

Q. 212. And when was that? A. That was during the moratorium, at the Stock Yards Bank, the various banks around the stock yards were in trouble, and the Stock Yard Company put up all they could. The Transit—the Central Manufacturing District did also, but still we were short some $4,000,000 which the Maine Company put up.

Q. 213. Now, just one other thing, Mr. Leonard. Will you be good enough to tell us what you need out there steadily as ordinary working capital? A. Oh, we require at least $500,000.

Mr. Welch: You may inquire.

Mr. Clark: Just a moment, if you please, Your Honor.

The Member: We will take a five-minute recess. (There was a short recess taken.)

Mr. Clark: I haven't quite finished my conference, Your Honor. I will be through in just a moment. (Pause.)

Cross-Examination.

X-Q. 214. (By Mr. Clark). Mr. Leonard, you have testified that, I think it was in 1934—I may be wrong as to the year—on the second day after a fire, there, Mr. McDonough and Mr. Prince appeared and discussed the matter of rebuilding. A. Mr. McDonough appeared the second day

after the fire and Mr. Prince, I think it was, the following day. Mr. Prince was on the steamer and as soon as he landed he came right out, but we were all in ruins when he was there.

X-Q. 215. Yes, but wasn't that rebuilt on funds of Transit Company? *A.* Wasn't it what?

X-Q. 216. Wasn't the rebuilding done on the funds of the Transit Company? *A.* Well, it wasn't rebuilt. We didn't build the yards entirely as they were before the fire.

X-Q. 217. No, no, but I mean whatever expenditure was made, wasn't it made out of the funds of the Transit Company? *A.* No, it was made out of the funds that we received from the insurance company, whatever we did.

X-Q. 218. Yes. *A.* Yes.

X-Q. 219. Well, that was Transit Company insurance. *A.* Oh, yes, yes; I don't mean to be technical, sir.

X-Q. 220. Neither do I. *A.* I wanted to be precise, that is all.

X-Q. 221. Now, during the years 1930, 1932, and 1933, how much cash did the Transit Company have, do you know? *A.* No, I don't know offhand, no.

X-Q. 222. Now, don't you, as a result of the depression in the stock yards business, have more yard than you need for the present activity of the Transit Company? *A.* No.

X-Q. 223. You don't? *A.* No.

X-Q. 224. You mean you need more yards— *A.* If we would have an increase of business—

X-Q. 225. Well, are your yards filled now with cattle? *A.* Well, it is cattle and hogs and sheep.

X-Q. 226. Well, what I mean is with livestock. *A.* No, the yards are not filled with livestock; no, sir.

X-Q. 227. So you have additional room, at the present time. *A.* Oh, yes, yes, sir.

X-Q. 228. Now, I believe you testified that the Jersey Company paid some expenses when the Elevated, so-called, went into receivership in either 1934 or 1935—I don't know when it was. Can you tell me what those expenses were? A. The South Side Elevated went into a receiver's hands in 1932——

X-Q. 229. Yes. A. —and they paid the Chicago Junction Railroad a rent, and they paid the taxes.

Well they failed to pay that rent and they failed to pay the taxes.

That rent was just about enough to pay the interest on the bonds and the Jersey Company paid the interest on the bonds in the absence of the money from the—

X-Q. 230. Whose bonds were those?

The Member: Wait a minute. Let him finish.

"—of the money from the—"; read the answer. Let us get it straight. (The last answer as partially completed was read.)

Mr. Clark: I beg your pardon.

A. (Continuing) —Elevated Railroad.

X-Q. 231. (By Mr. Clark). Let me ask you one more question, Mr. Leonard, and that is relative to the cash which Transit Company had in 1930, 1932, and 1933, if you recall. A. No, I don't recall the cash we had.

The Member: Now, Mr. Clark, will you ask him as to the years 1933 and earlier as to whether or not he had any vacant stock yards space or facilities. You have asked him as to the present time.

Mr. Clark: Yes. That is what I want to do.

X-Q. 232. (By Mr. Clark). In 1933, 1932, and 1930, did you have any vacant stock yards facilities in the Transit Company? A. Well, that is a difficult question to answer because your live stock comes in and goes out and when

you have ample facilities the commission men spread themselves about, and that might—

The Member: Did you have any excess facilities over and above what you needed to take care of the traffic, at that time?

The Witness: Yes, sir.

The Member: Now, any substantial excess? Was it anything substantially in excess of what you needed?

The Witness: No, I don't think so; no, sir.

The Member: Well, what would you say, that it was approximately what you needed or less than what you needed, or how are we going to get a picture of the relation between the amount that was used and the amount that you had over and above what you needed?

The Witness: May I say this, Your Honor: The secretary at about that time had these hogs coming in and the cattle coming in for slaughter, and the Government had a large area in there that required space that we might use but they wanted it for that purpose, and it was stock yard's purposes, of course, because the live stock came in and there was paid a yardage, but it was held there a number of days instead of coming in today and going out tonight and being vacant the next day.

Mr. Clark: May I ask, if I may interrupt, Your Honor—

The Member: I am through.

X-Q. 233. (By Mr. Clark). What percentage of the space you had available was in use during those years? *A.* As I say, they were spread out. It was all in use. We had a large area that was devoted to feeding cattle; that was under sheds.

X-Q. 234. I am talking about the total amount of space. *A.* I mean the total amount, and I am trying to tell you we don't have that, today.

X-Q. 235. Can't you give us— *A.* The stock yard busi-

ness is not a thousand bales of cotton that lies around but stock comes in and goes out the same day. I have had 120,000 hogs in the stock yards and have only had capacity for 70,000 hogs.

X-Q. 236. So you really could not answer that any more definitely than you have? A. I think not, sir. I honestly would tell you, if I could add it up and make two and two make four.

Mr. Clark: That is all.

The Member: You may stand aside. Do you have anything further?

Mr. Welch: Nothing further.

The Member: Stand aside. (Witness excused).

The Member: Call your next witness, Mr. Welch.

Mr. Welch: Mr. Henkle.

O. T. HENKLE.

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Mr. Welch: Would you mind sliding your chair back a little, Mr. Henkle? Will it move?

The Witness: Yes.

Mr. Welch: So that I will have space here?

I take it, that Your Honor does not mind my being so close to the witness? It happens to be convenient for the papers.

The Member: I would like it better if you would stand over at Counsel table.

Mr. Welch: Well, I—

The Member: If there is going to be any disadvantage by being over there—

Mr. Welch: I have only one serious habit, I like to stand up, and I do not like my papers below me too far.

Mr. Clark: I might say, Your Honor, that I was requested by counsel for the petitioner when Mr. Leonard was testifying to stand closely to him on account of the fact that he is deaf.

The Member: I understood that his hearing is defective, and I—

Mr. Welch: Yes, and I did stand close for the same reason. That is the reason I ask you now if you prefer that I stand elsewhere.

Q. 1. (By Mr. Welch). Your name, I think you have already stated? *A.* O. T. Henkle.

Q. 2. And you were sworn just now? *A.* Yes, sir.

Q. 3. Where do you live, Mr. Henkle? *A.* Chicago.

Q. 4. What address? *A.* 5309 Greenwood Avenue.

Q. 5. What do you do? *A.* I am vice-president and general manager of the Union Stock Yard and Transit Company.

Q. 6. That is the company that operates the yards? *A.* Yes, sir.

Q. 7. Are you a director? *A.* Yes, sir.

Q. 8. What, if any, position do you hold in the Chicago Junction Railway Company? *A.* I am a director in that company.

Q. 9. How about the Railroad Company, the Elevated Line? *A.* I am a director in that company also.

Q. 10. How about Produce Terminal? *A.* I am vice-president and a director of that company.

Q. 11. How about the little Stock Yards, Harness and Saddlery Company? *A.* I am a vice-president and director of that company also.

Q. 12. How about Pau Corporation? *A.* The same, vice-president and director.

Q. 13. Now, go back to the Transit Company and tell us,

if you will, when you first became connected with that company? A. In 1903.

Q. 14. In what capacity, sir? A. As assistant to Mr. Leonard.

Q. 15. What was he at that time? A. He was the general manager.

Q. 16. Prior to your going out there, what had you been, Mr. Henkle? A. I had been in business for myself in Chicago for 3 years.

Q. 17. Where did you conduct your business? A. At the stock yards.

Q. 18. Is that how you came to know the men running the yards? A. Yes, sir.

Q. 19. And was it as the result of that that you became employed? A. Yes, sir.

Q. 20. Now, going to the years 1930 to 1933, Mr. Henkle, what was your position then in the Transit Company? A. I was general manager until 1932, at which time I became vice-president and general manager as well as a director.

Q. 21. Were you a director all during the period 1930 to 1933? A. I didn't get the question.

Q. 22. Were you a director all through the period 1930 to 1933? A. Yes, sir.

Q. 23. Are you today still the vice-president and general manager and director? A. Yes, sir.

Q. 24. And are you the man who, more than any other, shall we say, is in charge of operations? A. Yes, sir; directly under Mr. Leonard and the president.

Q. 25. Mr. Henkle, I would like you to make such use of this map as you will and tell us a little more than we have heard about the stock yards and the rails and how things come in, and if His Honor will permit it, perhaps you may step down to the map. I think you may step down, Mr. Henkle, and tell us a little more than we have heard so far.

The Member: I am sure you have in mind that that map has not been introduced in evidence.

Mr. Welch: I mean to offer it in evidence after this witness has testified, or I will mark it now.

Would you mind marking it now?

Mr. Clark: You are marking it for identification?

Mr. Welch: I thought we would actually put it in evidence.

Mr. Clark: That is what I was wondering, whether you wanted to offer it in evidence.

Mr. Welch: Yes. It is quite a convenience I think to those who want to understand this whole enterprise and to see how closely it is knitted together. That is the theory that I have about it.

The Member: Is there any objection to its being received in evidence?

Mr. Clark: Just a moment, Your Honor. (Pause.)

Mr. Clark: No objection.

The Member: It may be received as Petitioner's Exhibit 3.

Let the record show that during the testimony of the Witness Leonard, the map to which reference was made in the course of his testimony was the map which is now being marked as Petitioner's Exhibit 3, and that that was the only map to which reference was made in that testimony.

(The map so offered and received in evidence was marked "Petitioner's Exhibit 3," and made a part of this record.)

Q. 26. (By Mr. Welch). Go ahead now, if you will, Mr. Henkle, and tell us about the stock yards and the rails, and so forth. A. (Indicating on map): The property of the Union Stock Yards and Transit Company extends for one mile along the west side of Halstead Street, and is bound on the north by Thirty-ninth Street, or Pershing Road, on the south by Forty-seventh Street, and on the west by Ra-

cine Avenue, which is one-half mile west of Halstead Street. And in that section is enclosed about 350 acres, there being a little more than a section, and it is the same property that was acquired in 1865.

Just north of Thirty-ninth Street, and a little more west is the property of the Central Manufacturing District and it has further property west on Pershing Road almost to Western Avenue.

The rails of the Chicago Junction Railway, east to the New York Central lines, extend all through the property as shown by the red lines on the map, through the property of the Transit Company as well as the district through Packingtown and westward to the lake—eastward to the lake.

The live stock at the Union Stock Yards is received in the north end of the yards. The rail live stock is brought in by the engines and crews of the line haul carriers and these crews remain with the trains until they are unloaded. As they come in they are set at one of the ten platforms, that are in the north end of the yards. As soon as they arrive, employees of the Transit Company begin to unload the cars, making note of the chutes, of the number of the chute into which the live stock is driven, and the number of the car from which it is driven.

In the meantime, the conductor of the train takes his way bills to what we call the receiving office, where they are called forth for the information of those present, and a bulletin is made and hung on the wall outside in the office so that all can see whether or not any live stock is consigned to them.

The first train that pulls up to the platform we will say is unloaded into a chute that was expressly designed and patented by Mr. Leonard many years ago, there being two chutes to each car length. The first train is unloaded

into the odd numbered chutes. As soon as it is unloaded, the engine and the crew go around to the other end and remove the empty train. Another train can then be pulled into the same platform and unloaded in the even-numbered chutes. In the meantime the employees of the Transit Company are making delivery of the livestock to such consignees as may be present and ready to receive attention. If not, they place it in other pens to clear the No. 1 chute for the succeeding train. By the time the train being unloaded in the even numbers is finished, we should have the animals all removed from the odd numbers, so that the next train can pull right in and thus make the unloading operation a continuous one.

After the live stock is unloaded, if it is received by the commission man, who is usually the consignee, he removes it to the part of the yards where he is accustomed to showing his live stock, and there he prepares it in such lots as he thinks will be most desirable to the purchasers.

After the commission man sells his live stock, he drives it over the scales, and it is there received by the new purchaser, the title passing as it goes over the scale. If that new purchaser happens to be a packer located here at the yards, the men of the packer come over and gather them up and take them over the over-head viaduct and into the packing houses which are immediately adjoining the yards on the west.

Q. 27. May I interrupt? Am I correct in thinking stock is driven on the hoof from the yards to the packing houses? *A.* Unless it is crippled or dead, yes.

Q. 28. Yes. And over these viaducts you have mentioned? *A.* Yes, sir.

Q. 29. Go ahead, sir. *A.* If the livestock is to be shipped out again it will be taken over to the platforms where customarily the cars of the road they desire to ship over are

set, and the employees of the yard could again load those animals.

I think that pretty well describes the movement of the animals through the yards.

Q. 30. We have some pictures, Mr. Leonard, that I think —or Mr. Henkle—that give us some further idea.

Mr. Welch: Doubtless, there is no objection to marking these, is there?

Mr. Clark: Oh, no, indeed.

Mr. Welch: Photographs? I will have them marked and then ask the witness. (Thereupon some documents were marked by the Clerk.)

Q. 31. (By Mr. Welch). Mr. Henkle, will you make such use of these exhibits as will be helpful to His Honor and to all of us in somewhat further picturing this thing to us, referring to the numbers of the pictures on the back as you may make use of them? Just pick them up and tell us anything they show and correlate it with the map, so far as you can.

The Member: Where are they marked? On the back?

Mr. Welch: They are marked on the back, yes. *A.* No. 5 is an airplane of the yard—

Q. 32. (By Mr. Welch). Turn it so His Honor can see it. *A.* —looking toward the northwest; this being the north end of the yards, as I described a moment ago (indicating) as bordering on Pershing Road.

The map shows the pens in some detail, with the Exchange Building in the center and the hog pens and unloading platforms in the north end of the yards. These platforms may be approached by the railroads coming in from the east or coming in from the west.

Q. 33. Packers plants are where, on the picture, Mr. Henkle? *A.* The plants of the packers are grouped along the west side of the yards and there is one large plant at the

south and a number of smaller plants north of the yards and two or three just northeast of the yards, but as a general thing they are very closely surrounding the yards, so that the animals can be driven on foot to any of these surrounding packing houses.

Mr. Welch: Mr. Clark, if you would like to come over here, so that you can understand?

Mr. Clark: I will look at it later.

Mr. Welch: We have had the pleasure of looking at the yards together, so you know what they are.

Mr. Clark: Yes.

Q. 34. (By Mr. Welch). Is there anything about the other pictures you want the record to show?

The Member: I want the record to show whether this is a correct representation of the yards as they were during the tax year in question.

Q. 35. (By Mr. Welch). How will they do as a picture of the yards in 1930 and 1933, Mr. Henkle? *A.* There are some portions of it that were destroyed in the fire of May 19, 1934.

Q. 36. I am talking only, however, about 1930 to 1933. Is it a fair representation of the yards in those years?

Well, I follow you: This was taken after the fire, then? *A.* Yes, sir.

Q. 37. Then what difference would there be between the picture you are now using and the condition as it existed during the years 1930 to 1933? *A.* The only difference that exists is that there are a few spots on this map—

Q. 38. Or picture— *A.* —on this picture, No. 5, that were there in 1933 and were not there when this picture was taken.

Q. 39. And by "spots," do you mean spots covered by pens in 1923? *A.* The spots that are now bare were covered

by pens in 1933, especially one small spot at the bottom of the yards.

Mr. Clark: I would ask you to point out, definitely, just what, in parts, were not there at that time.

Q. 40. (By Mr. Welch). Can you do that for us?

Mr. Welch: It is not in too clear detail, Mr. Clark. A. All parts that are here were there in 1933 but there were some more parts in 1933 than there are in this picture.

Mr. Clark: Can you indicate what those are?

The Witness: At the south end of the yards—

Mr. Clark: This will have to be in some way indicated for the record.

The Member: He has already testified as to the fact that this shows the yards so far as they are south of Pershing Road and Thirty-ninth Street, so that that indicates where the South Side is. The south side is the lower part of the picture, isn't it, Mr. Henkle?

The Witness: Yes, Your Honor.

The Member: So when you say "south side of the yards" you mean the lower end of the yard is shown on the picture, do you not?

The Witness: Yes, sir. There is a spot near the center of the picture at the south end of the cattle pens and adjoining what would be Forty-fifth Street extended across the yards where there is a bare spot shown in this picture that was covered with pens during the years 1930 and 1933.

There is another spot that shows in this picture as a parking space just south of the Exchange Building, which is in the middle of the yard. That, in 1930 and 1933, was covered with pens.

On the east side of the yards where now is shown automobiles parked, near the amphitheater, there were horse barns. Those are the only spots on the picture that are different from what they were in 1930 and 1932 and 1933,

there being much more facilities there then than there are now.

The Member: Now go to the other pictures and go over those as rapidly as you can.

The Witness: Picture No. 7 shows the Exchange Building which is in the center of the yards. The view is towards the north and show the general type of the cattle pens and the animals as they stand in the pens.

Q. 41. (By Mr. Welch). How about the elevated railroad structure? A. The elevated railroad structure is shown, together with the Exchange station. I think, Mr. Welch, I was wrong in stating the direction that this picture was taken.

Q. 42. I thought you were. A. It is taken to the south.

Q. 43. Looking south. A. Looking south.

The Member: Oh; that is looking south.

The Witness: They were standing at the north end looking south, in this picture.

The Member: The top side of the picture is the south side and the bottom is the north?

The Witness: Yes, sir.

The Member: The north side would be upside down.

The Witness: Yes, sir.

The Member: And what about the relation between that picture and the situation as it existed in 1933 to 1930?

The Witness: Everything in this picture was the same in 1930, 1932, and 1933 as it now shows.

The Member: All right. Take the next one.

A. No. 6 is a view looking to the west.

The Member: So that the bottom of the picture is the east side?

The Witness: That is correct, sir.

A. (Continuing) It shows the large Exchange Building, the east end of it, in the center of the picture.

It shows some of the Armour packing houses with the signs thereon.

It shows the Armour office building there are no signs on the building, and still other Armour buildings with signs on them, just south.

The line of freight cars in the foreground are set there to be ready to be loaded with stock, to the east.

Q. 44. (By. Mr. Welch). And by "stock to the east" you mean stock that may be shipped out to the East? *A.* Yes, sir.

Q. 45. I think that will be enough for that, Mr. Henkle.

The Member: Does that show the way it was in 1932 and 1933?

The Witness: No. The viaduct in the foreground is a concrete viaduct and the viaduct in 1930, 1932, and 1933 was a wooden viaduct.

The Member: Otherwise everything is the same?

The Witness: That would apply to all the viaducts that show here in the picture.

The pens, themselves, between these viaducts have been removed just at this spot but they were covered with pens of the same character during the period of 1930, 1932, and 1933.

Q. 46. (By Mr. Welch). Take picture No. 4. *A.* This is No. 4.

This is a view looking towards the west.

The top of the picture is the west, this time, and shows the top of the 46 double-decked hog houses at the north end of the yards, and also shows all platforms from 1 to 10 where livestock is unloaded and loaded out.

The Member: Could you step over a little closer to it?

The Witness: That's 6.

The Member: No. 6. You said looked towards the west, did you not?

The Witness: Yes, sir; but this one—

The Member: No. 4 looks in the same direction that 6 looks?

The Witness: From a point farther north, everything that shows in this picture (indicating).

Q. 47. (By Mr. Welch). No. 4? *A.* No. 4 is the same now as it was in 1930, 1932, and 1933.

Mr. Welch. That, I think, will serve us, Mr. Henkle, on pictures and map, and you can go back to the stand, if you will.

Q. 48. (By Mr. Welch). Do all the animals that come into the yards go over to the packing houses for slaughter? *A.* No, sir.

Q. 49. What happens to those who do not,—the animals that do not go over for slaughter? *A.* Well, some of them are shipped out to slaughter houses outside of the yards, or they may be shipped back to the country to be fed and further fattened.

Q. 50. How about,—what percentage of animals coming in go to immediate slaughter, and what percentage is shipped out? *A.* Well, of course, it varies from time to time, but I should say the average would be from 70 to 75 percent is slaughtered in and around the yards, and 20 to 25 percent—or 25 or 30 percent would go out again alive.

Q. 51. Is the flow of livestock into the yards steady, day by day, or does it vary throughout the week? *A.* It varies throughout the week, and very unevenly.

Q. 52. What is apt to be your heaviest day, or days? *A.* Well, usually, Monday is the heaviest day, the animals arriving during the night on Sunday to be ready for the market on Monday morning.

Q. 53. What is the biggest number of cars you have ever unloaded in a single day? *A.* I have been asked that so many times that I can reply readily,—it is 3,228.

Q. 54. And in what year was that? A. That was in 1904.

Q. 55. And what is the biggest number of cattle ever unloaded in a single day? A. 49,000.

Q. 56. Do you remember that year? A. 1908.

Q. 57. The biggest day of sheep? A. 71,000.

Q. 58. And in what year? A. About 1911, I think.

Q. 59. What is your record on hogs? A. 122,000 in one day.

The Member: You are talking about head, are you not?

The Witness: Yes, sir; yes.

Q. 60. (By Mr. Welch). All told— A. Except that the first answer was of cars.

The Member: That is the reason I am asking. The first answer was as to cars, and the next three as to head of live stock.

The Witness: Yes.

The Member: Is that right?

The Witness: Yes, Your Honor.

Q. 61. (By Mr. Welch). Now, refreshing your recollection, if need be, from any figures that you need, will you take the years 1930 to 1933 and tell us approximately how many animals were unloaded at the stock yards in each of those years.

Mr. Welch: This if Your Honor please, is animals of all kinds.

A. In 1930 we had 15,019,000; in 1931, 15,281,000; in 1932, 12,991,000; in 1933, 13,850,000.

Q. 62. That is far enough.

Now, of those years 1932 is the lowest; is that right? A. Yes, sir.

Q. 63. Twelve million, nine plus? A. That is correct.

Q. 64. How does that figure compare to previous years, Mr. Henkle? A. I don't find anything as small as that way back to 1897. Shall I look back farther than that?

Q. 65. No, I think that is far enough. A. To 1897.

Q. 66. How about the year 1933 as compared to earlier years? A. Well, that was the second—that is the second lowest for 50 years, I would say.

Q. 67. May I ask you just generally what has been the trend since 1933, upward or downward? A. It has been downward.

Q. 68. May I ask you what you anticipated in 1933, say, as to the probable trend of animals through the yards in the future? A. Well, I was of the opinion then that the trend would be downward.

Q. 69. Now, Mr. Henkle, you have told us about the way animals come into the yard, and I want you to now tell us, if you will, about sources of income. When a car is pulled in and unloaded, is that the time when the Transit Company begins to make money or earn money? A. The first earnings arises from the unloading charge of a dollar and a quarter for each single deck and a dollar and a half for each double deck car that is set at the platform.

Q. 70. That is an unloading charge? A. Yes, sir; and is paid by the railroads.

Q. 71. Then as the animals move into the yard, is there a yardage charge? A. Yes, sir; there is a charge per head for each animal that is unloaded on our property or in the yards.

Q. 72. And taking the years '32, '33, what was the charge per animal on the various kinds? A. By rail, the animals, the cattle, each head pays 45 cents yardage; each calf, 35 cents; each hog, 15 cents, and each sheep, 10 cents, and each horse 50 cents.

Q. 73. Now, when the animals reach the yards, may you get some more revenue by virtue of the fact that the animals are there? A. Yes. If the owner of the cattle has authorized his representative to feed the animals, we may

get further revenue from the feed that is ordered for the owner of the cattle.

Q. 74. Bedding? *A.* Yes, they may order bedding also.

Q. 75. Now, if an animal comes into the yard and is unloaded, and, let's say, is fed and watered and bedded, if you please, and then he goes over the ramps to the slaughter houses, is that the end of your income in the Transit Company from that animal? *A.* Yes, sir; the income that I have specified would cover those animals.

Q. 76. Now, is that the route that all the animals take, or not? *A.* No. I have said that some of them may be shipped out, and also there may be some of them that may be sold to a trader in the yards who assembles them, the various types and sizes of animals into even lots and sells them again. If he does that, when he sells them, we have a re-weighing charge on those animals, and if they are—

The Member: Re-weigh? Is that what you said?

The Witness: Your Honor, a re-weigh charge is a charge for weighing an animal the second or successive times. He gets one weigh in the charges that I previously mentioned, but if the—if in the trading he sorts his animals so that he doesn't know the weight of the parts that he is selling, then they must be re-weighed and there is a charge again for that.

Q. 77. (By Mr. Welch). Then may the animals be loaded again on freight cars, Mr. Henkle? *A.* Yes, sir; in which event we get from the railroads an additional dollar and a quarter for each single-deck car and a dollar and a half for each double-deck car.

Q. 78. You told us, Mr. Henkle, that you had a downward trend through the years '30 to '33. Would you take a moment to tell us the reasons for that downward trend? *A.* Well, there are various reasons for that downward trend. Our receipts in a general way are very much af-

fected by the crops either in our own direct territory or in other territories. If we have the drouth from which our animals come, that affects us very seriously in cutting down the number of animals that we receive at the moment. Also in recent years packing houses have sprung up throughout the center of Iowa and South Minnesota that purchase and slaughter a great many of the animals nearby where they are raised.

Furthermore, our receipts at the yards are cut down if the packers located at our yards go to points through the producing territory, buy their livestock there, and ship it into their plants without coming through our yards. So that all *of those factors affect our receipts.*

Q. 79. And I take it that shrinkage in receipts naturally means shrinkage in revenues? *A.* Certainly, because our revenue depends upon the numbers that we receive.

The Member: Well, now, may I point out this specifically? Are the reasons that you have given all actual reasons for the actual downward trend in the years up to 1933, beginning in 1930?

The Witness: No, Your Honor. There are conditions of trade that affect us and the conditions of demand in the East, and supplies in our territory. There is a great variety of causes that may affect our receipts.

The Member: You were asked to state what were the reasons for the downward trend in those particular years. You haven't answered that question yet unless you are willing to say that all of the reasons you have given generally are applicable to those years.

The Witness: I am willing to say that, Your Honor.

Q. 80. (By Mr. Welch). Now, was there any other factor, Mr. Henkle, beside the shrinkage in the number of animals going through the yards that affected revenue of the yards in the years 1930 to 1933? *A.* Well, I might go back

to the period of 1921, when the packers and stock yards act was passed, and we came under the administration of that Act, the regulation of that Act. Our charges were from that time forward subject to regulation by the Secretary of Agriculture.

Q. 81. Did you say, Mr. Henkle, when that Act went into effect? *A.* I think it was January 1, 1921.

Q. 82. Did its going into effect result in any actual reduction of your rates between the years 1921 to 1933? *A.* No, not in an actual reduction of the rates, but since that time our increasing costs not only for materials and supplies but for labor, which is our greatest item of expense throughout the course of years, has greatly increased. When I came there it was—we paid 17½ cents an hour for common labor, and now it is more than three times that much.

As these expenses increased, it became increasingly difficult to maintain a sufficient margin between our expenses and the amounts that were allowed us by the Secretary of Agriculture to keep up our revenue.

Q. 83. Is this regulation by the Secretary of Agriculture all the regulation from outside bodies to which you were subjected? *A.* No, sir.

Q. 84. What other outside bodies regulate you? *A.* The Interstate Commerce Commission. We are under their jurisdiction and regulation in connection with the loading and unloading of livestock of which I spoke a few minutes ago.

Q. 85. And are the rates for loading and unloading fixed by the Interstate Commerce Commission? *A.* Yes, sir.

Q. 86. May I ask you whether or not the rate that you have is in your opinion adequate? *A.* In my opinion it is not adequate. It only about covers the actual first cost of the labor.

Mr. Welch: If Your Honor please, I am now at a point where I wish to go into some figures in the stipulation. Other things being equal, I would prefer to start that in the morning.

Mr. Green: We go to 4:30.

Mr. Welch: I know, but we are very close to it.

The Member: We wasted 15 minutes at the luncheon hour. I would rather go on. These delays accumulate.

Mr. Welch: All right.

Q. 87. (By Mr. Welch). Directing your attention to S-3, attached to the stipulation which is headed "Transit Company, Net Income, Dividends Paid, and other data,"—I notice that of the net income of the Transit Company other than that received by way of rent from the Railway Company, the income in 1930 was $1,092,470.65.

Mr. Welch: Your Honor, would you appreciate my waiting a moment until you find it?

The Member: No, I can go ahead.

Mr. Welch: Good.

Q. 88. (By Mr. Welch). And for the year 1931, it is $831,750.69; for 1932, $2,549,549.30, and for the year 1933 a loss of $1,669,874.15.

There is, I notice, a great difference between the last two years that I have mentioned than the first two years.

A. Yes, sir.

Q. 89. Can you explain that difference, Mr. Henkle? *A.* Well, the year 1930—the year 1930 looks fairly normal. 1931 is not quite as good as it ought to be. In 1932 where it shows a profit of $2,549,549.30, we had an unusual and non-recurrent item there which I will describe as a re-weigh fund, which we took into our earnings in that year.

In 1921, 1922, or 1923,—I guess it was in 1921,—we had filed a tariff with the Secretary of Agriculture which contained a re-weigh charge. That was brought before the

Secretary of Agriculture, and a hearing was held which extended over a long period, during which time all of the re-weigh charges were impounded in a bank awaiting the decision of the Secretary of Agriculture.

That decision was not reached in such a form that we could take it into our accounts until 1932, and in that year the re-weigh charges had amounted to something like $2,400,000, which, after deducting the income tax, made an item of $2,000,000 to be taken into our earnings at that time, which came from perhaps—well, almost 10 previous years.

Q. 90. All right.

Then, there is a non-recurrent swelling of something like $2,000,000 in the 1932 figures; is that correct? *A.* That is correct.

Q. 91. And, to that extent, it is not a typical year's operation; is that it? *A.* That is correct.

Q. 92. Now, how about the next year, when you show a loss, and a serious one; is that an unusual situation, Mr. Henkle? *A.* In 1933 was the year of great distress when all the banks were closed, early in the year, and many of our securities and bonds and things of that sort, so far as depreciation in value, depreciated so far that there was a loss that year and a reduction in our assets of about $2,200,000, I think; something like that, and—

Q. 93. That, then, is it fair to say was an unusual year on the down side, because of those losses? *A.* That is correct.

Q. 94. Disregarding the unusual features, one on the up side and one on the down side, during those years, what was the trend of the revenues, net income of the transit company, during the year 1933? *A.* It was downward, without those items.

The Member: Excuse me, Mr. Henkle. I don't under-

stand this 1933 figure of a million some odd thousand deficit.

The Witness: Six hundred sixty-nine.

The Member: A million six hundred sixty-nine thousand?

The Witness: Yes, Your Honor.

The Member: Do I correctly understand you to say that that is substantially attributable to a drop in the market value of securities which you held?

The Witness: We had various stocks and bonds which, during the bank panic, decreased in value $2,200,000.

The Member: Would that be reflected in a deficit in your income?

The Witness: Yes; we didn't make nearly that much and it had to be charged to profit and loss during those years.

Q. 95. (By Mr. Welch). Were those securities charged off or sold in those years so that the losses were actually taken? A. They were charged and the losses actually taken. The securities were not sold because we weren't able to sell them.

The Member: They weren't operating items, were they?

The Witness: No, sir.

The Member: Everything you have talked about so far, with regard to 1930, 1931, and 1932, relating entirely to operating items, as I understood it.

The Witness: Yes, Your Honor.

The Member: Even including the impounded funds of previous years which emerged in 1932.

They were operating re-weighing charges, weren't they?

The Witness: Yes, sir.

The Member: Am I to understand, then, that the deficit of 1933 was unusual in that it reflected a non-operating item of a type that was different from the items which were included in the preceding 3 years?

The Witness: That is correct.

The Member: Now, can you eliminate the non-operating factor and deal alone with the comparison of the 1933 figure, without the non-operating item, compare that with the operating item of the previous years, so that they will be comparable?

The Witness: Well, I think, Your Honor, that a little further along in the testimony we come to the details of those items and the description of how that came about.

The Member: All right.

Q. 96. (By Mr. Welch). Mr. Henkle, without meaning to tie you at all to actual dollars and cents, can you approximate for His Honor the actual operating income for the whole 3 years so that he can have it, at least roughly, and see the trend of it? *A.* For 1931 we have already mentioned the net earnings there, of $831,750.69.

In 1932 there is the non-recurring item amounting to about $2,000,000. Without that item the earnings would have been $549,549, in that year.

The Member: Is that a fair representation of your operating income that year, $550,000?

The Witness: Yes, sir.

Q. 97. (By Mr. Welch). And in the next year? *A.* And in the next year the loss of $1,669,000, if we deduct that from $2,200,000 we have something a little less than $700,000 of the operating profit for that year.

The Member: That is a plus item, is it?

The Witness: That would be a plus item.

The Member: So that your deficit of a million some odd for 1933 would, instead, appear to be a profit—that is, an earnings item in excess of the earnings of the preceding year of $550,000; is that correct?

The Witness: Yes, sir. It would be a couple hundred dollars—

The Member: So that your trend would have been down and then up again, in 1933, wouldn't it?

The Witness: Yes, a little up in 1933 but not nearly so high as 1931.

Q. 98. (By Mr. Welch). Now, Mr. Henkle, I want to call your attention to something that appears in this picture, so I think it can be identified.

Can you point out to me and to His Honor something called the amphitheater?

Mr. Clark: Which numbered exhibit is that?

Mr. Welch: I thank you for that. It is in Exhibit 5.

A. The amphitheater is on Halstead Street, right here (indicating) and about a thousand feet from the north line of the property.

Mr. Welch: I am going to mark it, then—

A. (Continuing) It is on the west side of Halstead Street, not quite half way down the property.

Mr. Welch: I am going to mark it—will you mark it, if we can, on the exhibit, the letter "A," say, for "Amphitheater." I hope it will show. (The witness does as requested.)

Q. 99. (By Mr. Welch). Now, the building you have marked with an "A" on Exhibit 5, then, is the so called International Amphitheater, is that correct? *A.* Yes, sir.

Q. 100. By whom is it owned? *A.* The Transit Company.

Q. 101. About what is the size of that building? *A.* It is about 522 feet long, north and south; about 311 feet wide, east and west. It is two stories, in its entirety, and a portion of it, there is a gallery or corridor around it, making three stories, and there is approximately seven acres of floor space in this one building.

The Member: Is that where the stock show is shown every year?

The Witness: Yes, Your Honor.

Q. 102. (By Mr. Welch). Have you two pictures in the courtroom that show it, Mr. Henkle; meaning by "it," the amphitheater?

Mr. Welch: That has not yet been marked. I think I will offer them, if you don't object, Mr. Clark, so that he can talk about them.

Mr. Clark: That is all right.

Mr. Welch: If Your Honor will excuse me, we will have them marked.

Mr. Clark: When was that taken?

Mr. Welch: This is the present amphitheater, is it not? Mr. Henkle?

The Witness. Yes, sir.

Mr. Welch: Built after the fire?

The Witness. Yes, sir.

Mr. Clark: What does that mean; in what year?

The Witness: This picture might have been taken in 1934, 1935, 1936, 1937 because we give the same parade and have the same crowds every year, at the same hour.

The Member: It was taken after the fire in 1934, was it?

The Witness: Yes, Your Honor.

Mr. Clark: And how about this other one?

The Member: Wait just a moment now.

When you say "this one," that was taken after the fire of 1934, are you referring to the one which the Clerk is now marking as Exhibit No. what?

The Clerk: Nine.

The Member: No. 9; is that correct?

The Witness: Yes, sir.

The Member: Now, then, you have in your hand Exhibit what?

The Witness: This is No. 8.

The Member: All right. Now talk about that.

The Witness: Exhibit No. 8 is a photograph of the amphitheater looking towards the southeast. On the west of the amphitheater are parked hundreds of cars brought there by the attendants of the exposition.

The building at the north is the west elevation of the Stock Yard Inn.

The Member: Does that represent the situation as it was before or after 1933?

The Witness: After.

The Member: After the fire?

The Witness: Yes, Sir.

Mr. Welch: You

Mr. Clark: Well, I do not think that they are relevant exhibits, Your Honor. I hurriedly said that I would not object, and

The Member: Well, if they are good for anything at all they are certainly not good for that, that is true.

Mr. Welch: I do not particularly care.

Mr. Clark: Well, I want to

Mr. Welch: I want to talk about the history.

Mr. Clark: I am not going to object. I will let them go in for whatever they may be worth, but I just wondered what your purpose was.

Mr. Welch: I mean to show by the witness now that the previous amphitheater existed there of which we have no pictures, and I just want to show what went on in the old one. I do not think it would hurt the case. I am with you in saying, Mr. Clark, that we don't know after 1933, and I am willing to strike them out of evidence if it seems to you to make any difference.

Mr. Clark: No, I do not object.

The Member: We will spend now until 10 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., January 30, 1939, the hearing was adjourned.)

[Title omitted.]

SECOND DAY.

REPORTER'S MINUTES.

[Filed February 1, 1939.]

Hearing at Washington, D. C., on the 31st day of January, 1939, at 10 o'clock a. m.

The hearing in the above-entitled proceeding was resumed on this the 31st day of January, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

The Member: Go ahead, gentlemen.

Mr. Welch: If Your Honor please, before we start I would like to say a word about witnesses.

I have the feeling that this case is going to go a good deal more rapidly than I had supposed. At the end of the Petitioner's direct evidence there will be some expert testimony. I learned last night that one of the Petitioner's experts, who is an active, busy man in New York, cannot reach Washington until Wednesday afternoon, probably not in time to testify. It might be we will finish all the case except the expert testimony some time Wednesday, and in that event, if not too much time will be wasted, I might ask Your Honor's indulgence in not starting the expert testimony until Thursday morning. I hope I will not have to. It is not likely I will have to, but I thought I would mention it at this time.

Mr. Henkle, will you go back to the stand?

O. T. HENKLE

having heretofore been first duly sworn was recalled to the stand, and was examined and testified as follows:

Direct Examination (Continued)

Q. 103. (By Mr. Welch). Mr. Henkle, when we closed last night we were talking about Exhibits 8 and 9, Exhibit 8 being the exterior of the present amphitheater and Exhibit 9 being the interior of the present amphitheater. Was there an amphitheater on that same site before the fire of which we have spoken here from time to time? A. Yes, sir.

Q. 104. How long had the previous building been there? A. Well, there had been a building similar to this on that same site for twenty or twenty-five years.

Q. 105. What went on from year to year in that building? A. It was designed for holding the International Live Stock Exposition.

Q. 106. What is that exposition, Mr. Henkle? A. About 40 years ago a number of men that were interested in the live stock industry of the United States and Canada got together and formed an association for the purpose of holding an annual live stock show. They have done so for the past 39 years.

At that show there are exhibits from the best herds in the United States and Canada; all kinds of live stock.

Those who were most interested, the agricultural colleges and the most prominent of the live stock men, endeavored to establish the best types of live stock of all species and they also have educational features endeavoring to improve the breeds of live stock so that they may be raised more economically and be more valuable after they are finished.

The primary idea was for the advancement of the entire live stock industry so that those engaged in that indus-

try on which our business depends might be more prosperous and then we would have an opportunity to share in their prosperity.

The Member: Mr. Welch, can I interrupt this long enough to have you, as briefly as you can, expound to me the theory on which all of this history is put into the case, in view of the fact that your adversary has stated in open court that there is no contention now which the Petitioner needs to overcome that it was formed for the purpose upon which the testimony is based so that it is only a question of whether it is availed of; as I understand it, it is only a question of whether it is availed of in the taxable years 1930 to 1933. For that purpose I have difficulty in being able to find a place in that theory for the history of the Chicago Stock Yards Exposition Hall and these other facts that go back as far as 1865. I have been trying to do that ever since this case began. Perhaps you can simplify my obtuse mind on that.

Mr. Welch: I hope I can be of some help to Your Honor. I take it it is still in issue in this case as to whether or not the Maine Company is a mere holding company. It is, I believe, a part of my job to show that the Maine Company, as I said in my opening, dominates and directs and manages this whole enterprise. It is for that reason that I show what the enterprise is and then, from time to time from these witnesses, show when the domination of the Maine Company began and when it existed and that it existed in the years 1930 to 1933.

The Member: That is to say, you are giving the narrative history of this enterprise for the purpose of giving such a character to this Petitioner as will overcome any possible indication that it is a mere holding or investment company?

Mr. Welch: That is true, Your Honor.

The Member: Of course it is conceivable that irrespective

of its history that during the taxable years nevertheless it was a mere holding or investment company, isn't it?

Mr. Welch: That is true, but I conceive it, as I said, part of my duty to show by the witnesses the management of the Maine Company and the domination by that company in its activities.

The Member: I suppose as long as the Government insists upon making a blanket determination like this you have to meet every possible conceivable way in which it might be supported.

Mr. Welch: That is precisely correct.

Q. 107. (By Mr. Welch). You said something in your testimony, Mr. Henkle, about the purpose to improve the breed of live stock through the company. *A.* Yes, sir.

Q. 108. Has this exposition that has been run out there had any effect upon changing the character of live stock produced in the country? *A.* Indeed it has.

Q. 109. Have you some way, Mr. Henkle, in which you could show to us what change has taken place, and I show you this booklet in the hope it will be of some help.

If you are going to speak from that I will offer it in evidence, and I will tell you what I have in mind.

Mr. Welch: I wish to offer just a single page, showing how the character of live stock has changed.

Mr. Clark: I would have no objection.

Mr. Welch: I think I would like to just tear the page out.

Do you mind, sir (addressing the Member)?

The Member: No.

(The page so offered and received in evidence was marked "Petitioner's Exhibit 10," and made a part of this record.)

Will you state or have the witness state of record just what this page is?

Mr. Welch: I shall.

Q. 110. (By Mr. Welch). Will you look at the page before you and tell us the exhibit number of it, Mr. Henkle? *A.* Exhibit No. 10.

Q. 111. Of what assistance is that exhibit to you in telling us the effect that the International Live Stock Show has had on the breed of cattle in the country? *A.* The final object of the cattle breeder is to raise a steer that is of the most value when it is ready to sell, and that has been developed at the smallest cost. This picture shows three steers, one of the present day, one of about thirty-five or forty years ago, when the exposition started, and one prior to that time, when we started.

Q. 112. May I suggest that you hand it to His Honor? It is a small picture. (The exhibit was handed to the Member.) *A.* (Continuing) When the exposition started, the champion steer that year was a large animal almost 3½ years old and weighed about 1800 pounds. He had been fed for 3 years and paid taxes for 3 years. After about 40 years, we have got it down where the steer is now produced in about a year and a half and pays taxes once and eats less feed than before. That is quite an accomplishment for the entire cattle industry to learn through the types that we have shown and through the lessons that have been given in producing this smaller steer and producing it quickly and a better supply—a better type of meat in a less expensive way, and, of course, to him more profitable.

Q. 113. Mr. Henkle, will you tell us—

The Member: This is just the opposite of the "bigger and better" philosophy.

Mr. Welch: Apparently so, Your Honor.

The Witness: Quite so.

Q. 114. (By Mr. Welch). Mr. Henkle, I would now like to ask you what, if anything, the Maine Company, the tax-

payer in this case, has had to do with this exposition? A. Well, we wouldn't have been able to hold it since 1934 if the Maine Company had not given us permission and authority to reproduce the buildings that were burned.

Q. 115. Has Mr. Prince, the president of the Maine Company, to your knowledge taken an active interest in the show? A. He took a very active interest and decided that this building should be replaced.

Q. 116. I think you have testified, Mr. Henkle, that you were a vice-president and director of the Pau Corporation; is that right? A. Yes, sir.

Q. 117. Have you been since that corporation was formed? A. Yes, sir.

Q. 118. Who has been in charge of the operations of that little company? A. Mr. Leonard and myself under him directly.

Q. 119. It appears from the stipulation in this case, Mr. Henkle, that the company was formed on October 29, in 1931. Did it do any business in that year? A. No, I think the accounts are started the first of the year, 1932.

Q. 120. What was the purpose of the formation of this Pau Corporation? A. For a great many years the Transit Company had manufactured its own electricity for light and power, and as the years went along it became more importanf. We furnished first our own power and light, and then some for our neighbors, and along about 1916 we had extended to such magnitude that the Illinois Commerce Commission ordered us to incorporate the business so that it might come under their regulations in the regular way. That was done. And the distribution lines of the Produce Terminal Corporation extended through the district and to the Packingtown and all over our own property and to other points, and it was found desirable that the easement —an easement covering all of these properties should be

in one corporation for the good of all of them, so that in any changes of properties that the thought might be given to the interests of the others, and that nothing might be overlooked that would be to the detriment of someone of the companies. The Pau Company was therefore organized to take over the easements over all of these properties.

Q. 121. After it was organized did it receive an easement from the Transit Company? *A.* It did.

Q. 122. What kind of an easement was that? *A.* That was an exclusive easement covering all of the properties of the Transit Company and extended as well along the lines of the railroad which was owned by the Transit Company and leased to the New York Central Lines.

Q. 123. Now, let me ask you about the right-of-way over which the Chicago Junction Railway runs. Who owns that right-of-way? *A.* The Transit Company.

Q. 124. Did these easements that you speak of extend throughout the Transit Company land? *A.* It did.

Q. 125 Did the Pau Corporation receive some easements from the Central Manufacturing District? *A.* It did.

Q. 126. What easements did it receive from the district? *A.* It received an exclusive easement over all of the properties of the district.

Q. 127. After the Pau Corporation received the easements did it do something about an agreement to the Produce Terminal—with the Produce Terminal as to the use of them? *A.* It did.

Q. 128. What easement was that? *A.* Well, the Pau Corporation granted to the Produce Corporation a non-exclusive agreement to enable it to reach through the ducts and power lines—or ducts and conduits of the Pau, all of the properties which the Produce is now serving.

Q. 129. Now, Mr. Henkle, I would like to turn particularly

to the Produce Terminal. You are an officer of that company? A. I am its vice-president and a director.

Q. 130. And have been how long? A. Since its inception.

Q. 131. Are you active in the management of that concern? A. Yes, sir; under Mr. Leonard, the president.

Q. 132. I think you have already told us how its business has grown. A. Yes, sir.

Q. 133. And I won't cover that again.

What has been the cause of the expansion of its business, Mr. Henkle? A. Well, increased demand for the tenants and businesses which it has been serving for many years, and also new customers when they come into the district, if is necessary for them to have current, so that there has been a steady growth of the volume of electricity required.

Q. 134. Taking the years 1930 to '33, were you looking forward to further growth of the Produce Terminal business? A. Yes, sir.

Q. 135. Take 1933 as a sample. What resources did you have available for use in increasing your equipment? A. Well, the Produce had not considerable funds to make any considerable increase in the size of its equipment or its distribution lines.

Q. 136. Was there any place to which you could turn for financing as you needed to expand? A. Well, we turned to the Maine Company.

Q. 137. Have you had occasion to do that in the past? A. Yes, sir.

Q. 138. Now, what part, if any, does the Maine Company play in the management of Produce Terminal, taking the years '30 to '33? A. Well, the Maine Company was constantly in touch with the affairs of the Produce Terminal, and if we wanted any additions to the power house or the distribution lines, they were discussed with the Maine Com-

pany, and if they were authorized by them, then we could go ahead and enlarge our facilities.

Q. 139. Does the Produce Terminal make any reports of any kind to the Maine Company? *A.* Yes, sir.

Q. 140. What kind of reports and how often? *A.* They make a complete operating report every month.

Q. 141. I show you this book and ask you if it contains copies of reports made by Produce Terminal from time to time to the Maine Company? *A.* This is a summary of operations for the month of December, 1933, containing 16 pages all relating to details of operation of the plant. That goes to the Maine Company every month.

Mr. Welch: If Your Honor please, I should like to mark as an exhibit this report for the month of December, 1933, only and do so, if I may, without removing it from the book because it is a bound book.

Any objection to it?

Mr. Clark: No.

The Member: Is that a typewritten page?

Mr. Welch: It is a form.

The Member: I was wondering whether a copy of it could not be substituted.

Mr. Welch: Let the record show—I shouldn't say that.

The Member: If your adversary is willing to have a copy of it without the book itself.

Mr. Pierson: May we see that, please, before you offer it?

Mr. Welch: Yes.

The Member: We can reserve a number for it.

You have got the forms, I suppose?

Mr. Welch: Indeed.

Mr. Clark: What is the purpose, Mr. Welch, in this?

Mr. Welch: I should think it was quite obvious, Mr.

Clark. We want to show that the Produce Terminal reports monthly to the Maine Company what it has done.

Mr. Clark: But why the detail of it?

Mr. Welch: I am interested to show that everything Produce Terminal does is reported in full detail to the Maine Company.

Mr. Pierson: I see no objection to it.

Mr. Welch: Then, if Your Honor please, I should suggest this, that we mark this December in the book with an agreement that Counsel for the Petitioner may substitute a photostat or a copy after the trial is closed.

The Member: That may be done. Let it be marked.

Always with the right of the Respondent to call attention to any inaccuracies which verification may disclose.

Q. 142. (By Mr. Welch). Mr. Henkle, were reports identical in character to those in Exhibit 11, were reports identical in character to those in Exhibit 11 made by the Produce Terminal to the Maine Corporation during the years 1930 and 1932 as well as in 1933? *A.* Yes, sir; every month.

Q. 143. Who decides who shall make up the board of directors of the Produce Terminal? *A.* The Maine Company.

Q. 144. Who selects your bank depositories? *A.* The Maine Company.

Q. 145. Was there a substantial installation of new machinery in Produce Terminal in 1932 and 1933? *A.* Yes, sir.

Q. 146. Was that matter discussed with officers of the Maine Company? *A.* Yes, sir.

Q. 147. To what extent, Mr. Henkle? *A.* Well, Mr. Leonard and I figured out what we thought we needed in the way of additional equipment, and it was discussed with the Maine Company and they approved our going ahead with the improvements.

Q. 148. Have there been any occasions, Mr. Henkle, when

suggestions of yours as to something you wished to do about Produce Terminal have been turned down? A. Yes, sir.

Q. 149. Go back for a moment to that installation of machinery. From whence did the money come? A. It came from the Pau Corporation and the Pau Corporation received it from the Maine Corporation.

Q. 150. Can you give us a sample, Mr. Henkle, of a suggestion of yours on behalf of Produce Terminal made to the Maine Company which was turned down? A. Mr. Leonard and I felt we should have a larger addition to the power house than that we finally succeeded in getting, and we wanted a greater capacity and a larger power house than we succeeded getting them to build.

Q. 151. When was that, Mr. Henkle? A. That particular instance was in 1936 and 1937.

Q. 152. I would like to ask you, Mr. Henkle, if the Transit Company makes reports to the Maine Company of its operations? A. It does.

(Mr. Welch shows a bound volume to Mr. Clark.)

Mr. Welch: This is the same sort of a document.

Q. 153. (By Mr. Welch). I show you a book, Mr. Henkle, called "Summary of Operations," the month of December, 1933, and ask you if that is a sample of the report that the Transit Company makes to the Maine Company? A. It is.

Q. 154. How often is such a report made? A. Every month. It contains 32 pages.

Mr. Welch: I should like to offer this as a sample report under the same arrangement that a copy may be substituted after the evidence is closed.

The Member: Is there any objection?

Mr. Pierson: No objection.

The Member: It is received.

(The document so offered and received in evidence, was

marked "Petitioner's Exhibit 12," and made a part of this record.)

Q. 155. (By Mr. Welch). Mr. Henke, during the years 1930 and 1932 as well as in 1933 was the Transit Company making these monthly reports to the Maine Company? A. Yes, sir.

The member: Let me ask you about that: You say they were making reports to the Maine Company. Were they making the reports directly to the Maine Company or were they simply sending to the Maine Company copies of reports that were otherwise made?

The Witness: They were copies of reports, Your Honor, that we made of the operations all through the month and when completed for our own operating knowledge and assistance, that copy was sent to the Maine Company every month.

The Member: Was there a copy of it also sent to the New Jersey Company?

The Witness: We sent two copies to the East, and I suppose one might be for the Jersey Company and one for the Maine Company.

The Member: But they weren't expressly made as reports to the Maine Company; they were simply copies sent to the Maine Company of reports otherwise made; is that right?

The Witness: That is correct, yes.

Q. 156. (By Mr. Welch). Were they requested by the Maine Company? A. Yes, sir. I would say they were ordered by the Maine Company.

Q. 157. I think previously in your testimony you have said something about some litigation with the Department of Agriculture on re-weighing charges. A. Yes, sir.

Q. 158. Was there a period during which your re-weigh

ing charges were in question in this litigation? A. Yes, sir.

Q. 159. During that period did you continue to collect at the old established rate? A. We did.

Q. 160. What was done with the re-weighing charges that you collected during the period of the litigation? A. They were impounded in the bank.

Mr. Welch: Would somebody give Mr. Henkle a copy of the balance sheet and income statements of the Transit Company because I want to ask him some questions about it?

(Mr Green hands documents to the witness.)

Q. 161. (By Mr. Welch). At what exhibit attached to the stipulation are you now looking? What is the number of it? A. S-3.

Q. 162. Look at the year 1921 for me, will you, please, and let me ask you if that is the year in which this litigation began? A. Yes, sir.

Q. 163. Does Exhibit S-4, attached to the stipulation, show your cash at the end of December 31, 1921? A. Yes, sir.

Q. 164. Does that item of cash at the end of that year include these impounded re-weighing charges? A. No, sir; because they were in the bank in a separate account.

Q. 165. Look at the other side of the sheet for a moment and see if you do not find that the re-weighing charges are in the cash and compensated with a balancing item on the other side. A. Yes, that is correct. I was looking at the net amount.

Q. 166. So that the re-weighing charges do appear in cash at the end of 1921? A. Yes, sir.

Q. 167. And to what extent, sir? A. Mr. Welch, could the accountant—

Q. 168. I know your difficulty and I will help you in a moment.

I will just refer to the stipulation. Make such use of

the stipulation itself (handing document to the witness) on record in the case as you need to and then tell us, if you will, how much impounded re-weighing charges are included in your cash at the end of 1921. A. $33,655.10 for that year.

Q. 169. Go to the next year and tell us the amount. A. $206,185.85.

1923—

Q. 170. Wait a moment.

Mr. Henkle, I am not asking you from year to year how much was impounded in each year. I am asking you to state for us if you will the total cumulative amounts impounded from year to year.

Do you follow me? A. Yes; I have it in another column.

Q. 171. Yes.

Now, to what extent were re-weighing charges impounded as of the end of 1922? A. $239,840.95.

Q. 172. And is that item included in your cash that year? A. Yes, sir.

Q. 173. Will you identify for us the compensating item on the other side so that we will know what its legend or name is? A. That will be found in the clearing account among other items in that account.

The Member: Just a moment.

What did you say the amount was, $239—

The Witness: $239,840.95.

The Member: That was the end of 1922?

The Witness: Yes, sir.

The Member. And the clearing account shows $237,761.51.

The Witness: Your Honor, there are other small items—that is apparently the total of the clearing account which includes that item.

The Member: That is what I am interested in. You say that $237,761.51, which is the clearing account, includes an

item of $239,000, which is the impounded funds. I would like to understand that.

The Witness: If we have the account here for 1922 I could show Your Honor in that same account some other small items which leaves the balance of the clearing account as the figure that you have while—

The Member: You mean charges against it?

The Witness: No. They have no relation to that particular item.

The Member: My point is you have said a figure of $237,000 clearing account includes a figure of $239,000, which is $2,000 more, which is the impounded fund, and I am asking you now whether that difference is made up by virtue of some charges against the clearing account or otherwise, and I haven't yet heard any explanation.

The Witness: The difference is accounted for by charges into the clearing account of other items that have no relation to this.

The Member: But they are charges; that is the point.

The Witness: Yes, sir.

Mr. Welch: If Your Honor please—

The Member: Perhaps it is not important. I don't know. I wanted to be sure it was not an inadvertent statement because $237,000 can't include $239,000 unless there is a charge against it.

Mr. Welch: The witness has made a correct answer, and I think Your Honor understands all I am trying to show is how these impounded funds were built up, and then released one year which swelled the income very greatly for that year.

The Member: That is bringing it into the 1932 figure to which you referred yesterday?

Mr. Welch: That is correct.

Q. 174. (By Mr. Welch). Now, would you run along, Mr.

Henkle, and tell us year by year how your cash was swelled by the impounding of this fund. A. At the end of 1923, $431,101.85; 1924, $761,200.72; 1925, $1,050,020.48; 1926, $1,307,987; 1927, $1,547,133.97; 1928, $1,780,796.50; 1929, $2,013,523.54; 1930, $2,243,786.82; 1931, $2,426,433.29.

Q. 175. Now, was that fund at some time released from impounding and placed with your general funds? A. It was.

Q. 176. When was that, Mr. Henkle? A. In 1932.

Q. 177. I take it, then, that the litigation ended at that time? A. Well, it had ended when the period at which it was definitely concluded that the money might be taken into our earnings had arrived.

The Member: That figure you say was two million four hundred and some odd thousand?

The Witness: $426,433.29, Your Honor.

The Member: Was it you who were on the stand yesterday when we talked about this figure of 1932 income, or was it your predecessor, Mr. Leonard?

The Witness: I was on the stand when that question was brought up.

The Member: You remember, don't you, that we tried to get a curve of net income for 1930 to 1933, and the testimony indicated that from one million ninety-two thousand in '30 to eight hundred and thirty-one thousand in '31, it dropped to about $550,000 because of the subtraction of the two million dollars?

The Witness: Yes, sir.

The Member: Of impounded funds.

Now, am I to understand that the earnings by reason of that exclusion of the impounded funds instead of being $550,000 would come to about $100,000 in 1932; is that right?

The Witness: No, Your Honor. The 1932 earnings were affected by this $2,426,433.29 being taken into the accounts

in that year under our earnings less about $400,000 of tax which made an unusual and non-recurrent item of $2,000,000 in our earnings for that year.

The Member: That is, the operating income, then, would have been a hundred and some odd thousand plus the four hundred thousand which you say was tax so as to make a true operating income of $500,000?

The Witness: I had that figure. It seems to me that year it was about $531,000 after making that correction.

The Member: So that after all, the five hundred thousand figure is the result of more or less normal operating income after excluding the $2,400,000 of impounded funds; is that right?

The Witness: That is correct, except that that—

The Member: All right.

The Witness: —was a very small year.

The Member: Well, I am only seeking to get the approximate trend of the curve. That is all I am interested in.

Mr. Welch: I understand that.

Q. 178. (By Mr. Welch). Will you look at S-4 attached to the stipulation, Mr. Henkle, and tell me whether or not there is on your balance sheet, in the year 1930, an item of "100,000 Chicago real estate bonds." *A.* I don't see it in S-4, Mr. Welch.

Q. 179. I hope I haven't given you the wrong number. *A.* Oh, it is farther down in the middle of the page.

Q. 180. Have you found the item to which I am referring? *A.* Yes, sir.

Q. 181. What is the item, please? *A.* It is $100,000 of Chicago real estate bonds taken over from the Stock Yards Trust & Savings Bank.

Q. 182. Are you familiar with the nature of that investment at that time? *A.* I am.

Q. 183. What was it? *A.* Well, they were real estate

bonds that were slow, and in order that the bank which needed the money at that time might have that amount, we purchased them from the bank.

Q. 184. In 1930, Mr. Henkle, was it possible to dispose of those bonds at anything like their face value? A. No, sir.

Q. 185. Now, the same bonds are carried, are they not, in 1931, '32, and '33? A. Yes, sir.

Q. 186. On S-4? A. Yes, sir.

Q. 187. Is what you have said about them equally applicable to the years '31 and '32? A. Yes.

Q. 188. As to the year 1933? A. Absolutely.

Q. 189. Had you been able to sell any of them by the end of 1933? A. No, sir.

Q. 190. Have you ever been able to? A. No, sir.

Q. 191. Will you look at your balance sheet for 1930 again, S-4, and see if you find an item of $464,000 "Capital Stock of the Stock Yards National Bank"? A. Yes, sir.

Q. 192. Just read the item to me, if you will. A. "Investments in Stock Yards National Bank, capital stock, $464,000."

Q. 193. Were you a stockholder in that bank personally? A. I was.

Q. 194. Did you have knowledge of the salability of that stock? A. I did.

Q. 195. What was its salability? A. Well, there wasn't any salability.

Q. 196. I think that item continues on your books in '31 and '32, and disappears in '33. Will you tell me if that is correct? A. Well, at the beginning of 1933 the bank was closed, and under the arrangement by which the bank was finally opened, the stock of the Stock Yards National Bank became without value.

Q. 197. Now, will you look again at the year 1932, on S-4,

and tell me if you find an item of investment in Stock Yards Investment Company debentures? A. Yes, sir.

Q. 198. What is the item and what is the amount? A. It is $1,340,000. That was—

Q. 199. Well, I asked you to read the item. What is the item? A. "Stock Yards Investment Company Debentures, $1,340,000."

Q. 200. Yes. What was that investment? A. The Stock Yards Investment Company issued debenture bonds on various notes, securities, and general collateral which had been taken out of the bank because the Government examiners had classed it as slow and doubtful paper and not suitable for remaining in the bank at that time.

Q. 201. What bank was that, Mr. Henkle? A. It was the Stock Yards National Bank.

Q. 202. Yes. Go ahead.

Have you told us—

The Witness: Will you read the answer as far as I got? (Answer read.)

Q. 203. (By Mr. Welch). How did it happen that the Transit Company acquired debentures? A. Why, in order to be of assistance to the bank in its operations and to keep the bank going.

Q. 204. Did Produce Terminal also acquire some for the same reason? A. Yes, sir.

Q. 205. What amount? A. $350,000.

Q. 206. Now, looking again at Transit Company, what year are you telling me now where they first appear, Mr. Henkle? A. 1932.

Q. 207. Look at the next year for me and see if you find the same item at a different figure, will you, please? A. Yes, sir.

Q. 208. What is the item and what is the figure? A. $149,620.23, the value at the end of 1933 of those bonds.

Q. 209. That item, then, the shrunken value, represents a write-off from the original amount down to that statement; is that correct? A. That is correct.

The Member: Without any disposition of the debentures at all?

The Witness: That is correct, Your Honor.

The Member: Can we find out now what the investment company is?

Mr. Welch: Well, I was going to ask him another question or two.

The Member: All right. Before you leave that, I mean.

Q. 210. (By Mr. Welch). Was the item at some time written down to zero? A. Well, at the end of December 31, 1933, it had been written down to $149,620.23, and I am sure that since that time it has been completely written off.

Q. 211. And the reason for that, Mr. Henkle? A. Well, it is because the bonds were unsalable and the collateral behind them had so shrunk that they were without value.

Q. 212. Were these debentures salable in either 1932 or 1933? A. No, sir.

Mr. Welch: Now, I am not sure whether Your Honor wants something else asked about them or not.

The Member: I want to ask two questions: One, did you make an effort to sell them?

The Witness: I don't know, Your Honor, whether such effort was actually made or not, but—

The Member: What is it you mean when you say that they were not salable.

The Witness: Well, the paper that these bonds represented was not salable, and that was the reason they were taken out of the bank. They couldn't be sold at that time.

The Member: Well, that is what I am trying to find out, how you know that.

What makes you think that?

The Witness: Well—

The Member: They were not salable if you didn't attempt to sell them.

The Witness: Well, I knew the character of these securities. They were on live stock ranches, and you couldn't sell them at any price at that time, neither the bonds nor the collateral behind them.

The Member: And one other question: What was the Investment Company?

The Witness: The Western Investment Company was formed for the purpose of taking out of the bank the paper that had been classed as slow and doubtful, and the banking authorities—the Government banking authorities insisted that that must be taken out of the bank, that it was not suitable collateral to remain in the bank.

Q. 213. (By Mr. Welch). May I ask you whether or not when they were taken out of the bank, money to the extent of their face value was put in? *A.* Yes, sir.

Q. 214. By whom? *A.* By the Transit Company.

Q. 215. You have mentioned this Stock Yards National Bank and the Stock Yards Trust & Savings Bank; is that correct? *A.* That is correct.

Q. 216. And you have told us about doing these things in connection with those banks.

What was the purpose of the Transit Company in doing what it did about these banks? *A.* Well, to a stock yards a bank is a very important necessity. The bank is there not only to have the deposits of the commission men have their own funds, but also have the funds that are on the way to the producer who has shipped live stock into the stock yards. The buyers and sellers in the market use it for their private and business accounts. The bank will loan money to a farmer who has feed and wants to buy live stock but has no money. They will loan him the entire amount neces-

sary to buy cattle to take back to his farm to eat his grain and his grass, and when it is returned then the bank is payed off at the time the animals are marketed. And that is the whole process of the live stock industry.

In addition to that, there are accounts of many country banks. At that time there were more than 100 country banks that had funds in the Stock Yards National Bank for the convenience of their customers in getting their money back when they had sold their live stock. In fact, the bank is about the first thing you have to establish and maintain in a stock yards. It is absolutely essential, and if anything happens to the bank then, certainly, a farmer would not want to ship stock to a market where he was in doubt whether he would get his money back. And we must have a fair and solid name if we are going to be of use to the market. That was what we wanted to protect.

Q. 217. Will you look again at S-4, at the end of December 1, 1933, and see if you find an item of "Subordinated Funds." *A.* Yes, sir. The last item is "Subordinated Funds, $1,300,000."

Q. 218. What does that item represent? *A.* That item represents money that we had on deposit in the bank at the time it was closed. In order that it might be opened, by arrangement with the banking authorities, we had to subordinate that cash to the deposits of others in the bank before it could be placed in position to again open.

Q. 219. Do you know what the ultimate recovery from those subordinated funds has been? *A.* There has been no recovery from those funds.

Q. 220. As at the end of 1933 was it possible for you to withdraw any of those funds, Mr. Henkle? *A.* No, sir.

Q. 221. Will you look at the balance sheet of Produce Terminal, which is S-215, Mr. Henkle? Will you look at the end of 1931, December 31, and see if you find an item there

of Chicago real estate bonds? A. Yes, sir; I find an item of $490,500 of Chicago real estate bonds taken over from the Central Manufacturing District Bank.

Q. 222. What was that bank? A. That was the bank in the center of the Central Manufacturing District which we have described before as a great industrial industry—great industrial district, having many large industries that keep their funds in that bank.

Q. 223. Of what did this investment consist? A. The real estate bonds which were taken over from the Central Manufacturing District bank were bonds that the examiners had classed as slow and doubtful, and in order that they might have cash in their vaults instead of these bonds, the Produce took over $490,500 worth of bonds and gave them cash therefor.

Q. 224. At what price or value were they taken over? A. The price of $490,500 was the par value of those bonds.

Q. 225. And how about their salability? A. They were unsalable.

Q. 226. That item appears, I think, at the end of 1932, and again with a slightly different value at the end of 1933; is that right? A. Yes, sir.

Q. 227. Does what you have said about their salability apply to '32 and '33 as well as '31? A. Yes, sir.

Q. 228. Now look at the balance sheet of the Produce Terminal, which is S-15, and see if at the end of 1932 there is an item of $350,000 Stock Yards Investment Company debentures? A. Yes, sir.

Q. 229. You mentioned those, I think, before, didn't you? A. No.

Q. 230. Are these debentures the same sort as the Transit Company's debentures of $1,340,000? A. Yes, exactly the same.

Q. 231. Exactly the same? A. Yes, sir.

Q. 232. And does what you have told us about those debentures that the Transit Company took out of the bank apply equally well to what Produce Terminal took out? *A.* Yes, sir.

Q. 233. One further item on Produce Terminal's balance sheet, at the end of December, 1933. Is there an item of subordinated cash? *A.* Yes, sir; of $300,000.

Q. 234. What is that item, sir? *A.* That is the amount of cash in the Stock Yards National Bank that had to be subordinated to the general depositors before the bank could be reopened.

Q. 235. Was it subordinated to any one other than the general depositors? *A.* It was subordinated to the subordinated cash of the Maine Company.

Q. 236. So that the Maine Company's deposits on the first level were subordinated; is that right? *A.* That is correct.

Q. 237. And yours on a level below subordinated, in turn, to the Maine Company? *A.* That is correct.

Q. 238. Has there been any recovery from that subordinated cash, Mr. Henkle? *A.* There has been no recovery, sir.

Q. 239. At the end of 1933 was it possible for you to withdraw that cash or any part of it in any way? *A.* No, sir.

Q. 240. What was the purpose of Produce Terminal in coming to the aid of these banks? *A.* Well, the Produce Terminal served the entire district and all of its industries with light and power, and if this bank had failed, it was unable to go on, so that the industries in the district could not have their cash on which to operate, they would have had to close or shorten down, and then, of course, the Produce would have lost its customers, part of them, or there would have been greatly reduced requirements.

Q. 241. Just one thing further, Mr. Henkle: Will you tell

us what Produce Terminal needs in the way of ordinary working capital? A. About $300,000, I should think; at least.

Mr. Welch: You may inquire, Mr. Clark.

Mr. Clark: Your Honor, I take it there would be no objection to Mr. Pierson's conducting cross-examination.

The Member: No, as long as he does it all, as to this witness.

Mr. Clark: Yes.

The Member: That is all right.

Mr. Clark: I just wanted to be clear.

The Member: The only thing is I don't want a witness to object to what turns out to be the heckling of two or three if you can exchange places. As to any one witness, I don't care what counsel is designated to examine him as long as it is confined to but one.

Cross-Examination.

X-Q. 242. (By Mr. Pierson). Mr. Henkle, in your direct testimony you testified with regard to the increased size in the production of steers? A. Yes, sir.

X-Q. 243. I take it that you don't mean to tell the Board that it is the Chicago Transit Company that has developed this, themselves. Is that the impression you mean to leave? A. I think in your question that you said I talked about the increased size of steers.

X-Q. 244. Yes. A. I said the size of the steer had decreased and that that had resulted from the work of the Live Stock Exposition and to the benefit of the Transit Company because it was a more economical animal for the live stock producer to raise; the smaller animal I was talking about; and that has now been developed.

X-Q. 245. But that development, Mr. Henkle, also is the result of the activity of the Department of Agriculture and

other Government agencies, isn't it, aside from that? A. Certainly. They were there and exhibited every year with all sorts of charts and instructions as to how you could improve your feeding. They were a part of the exposition.

X Q. 246. Mr. Henkle, I believe that you testified that the Maine Company was looked to by the Produce Terminal Corporation from time to time for funds necessary for its activities; is that correct? A. That is correct.

X Q. 247. Do you know whether Produce Terminal Corporation paid any dividends in the taxable years here before the Board, 1930, 1931, and 1932? A. They did.

X Q. 248. And do you know to whom that dividend was paid? A. It was paid to the stockholders, and the Maine Company was the stockholder.

X Q. 249. That is, it was a hundred percent stockholder. A. Yes, sir.

X Q. 250. Mr. Henkle, I believe you stated in your direct testimony that you were an officer and director in the Transit Company? A. Yes, sir.

X Q. 250½. And in the Railway Company? A. I am a director of the Railway Company.

X Q. 251. And the Railroad Company? A. A director.

X Q. 252. And also in the Produce Terminal Company? A. Vice-president and director.

X Q. 253. And in what other companies, if you will restate those, if you please? A. First as the vice-president and director of the Union Stock Yard and Transit Company, and in addition to the ones I named I am vice-president and director of the Stock Yards Harness and Saddlery Company that was mentioned here yesterday.

X Q. 254. Now, Mr. Henkle, do you know whether Mr. Prince was an officer and director in any of these companies? A. Beginning with the Union Stock Yard & Transit Company, Mr. Prince is chairman of the board and a

director; of the Railway Company, he is a director; of the Railroad Company, he is a director. That is correct, with regard to those three companies.

X-Q. 255. Can you see this chart (indicating chart) from where you are sitting, Mr. Henkle?

The Member: Give him this. (A smaller duplicate of the chart referred to was handed to the witness.)

X-Q. 256. (By Mr. Pierson). I wish you would also state if you know in what other companies Mr. Prince was an officer or director, which appears on Petitioner's Exhibit 1, aside from those that you stated? *A.* As a director of the Live Stock National Bank of Chicago. I do not know whether he is a director of the Central Storage and Forwarding Company. I believe that is all.

X-Q. 257. Isn't he a trustee in C. M. D.? *A.* Oh, yes, sir.

X-Q. 258. Mr. Henkle, I show you what has been introduced in evidence as Petitioner's Exhibit 5 with respect to which you testified yesterday.

Am I correct in stating that this picture was taken after our taxable years 1930 to 1933? *A.* I so stated, and that is correct.

X-Q. 259. I believe you further stated, Mr. Henkle, that some portion of the stock yards which is shown here in Petitioner's Exhibit 5 has not been rebuilt. *A.* That is correct.

X-Q. 260. Now, Mr. Henkle, with respect to that which has been rebuilt, what type of pens did they put in? *A.* The same type as before, sir.

X-Q. 261. That is, wooden pens? *A.* Yes, sir.

X-Q. 262. And, Mr. Henkle, wasn't that done with funds from the insurance company that was received after the fire? *A.* That is correct. It was from the general funds received from the insurance company.

Not all the properties, however, were restored.

X-Q. 263. The Maine Company didn't give you any funds to rebuild, did they? A. Oh, yes, they did. Take, for instance, the International Amphitheater. We didn't need to rebuild that, but Mr. Prince was so much interested in the success for the industry of that exposition that he wanted to see that continued, and so allowed us a million and a quarter dollars for that particular purpose out of the insurance funds.

X-Q. 264. Out of the insurance funds. A. Yes, sir; but we didn't have to do it. We could have kept it and gone home.

The Member: Will you answer the question as to whether the Maine Company actually provided funds for the reconstruction of any of the burned properties? You said "Yes," and then you explained it by showing they let you use the insurance funds.

Did they, in fact, give you any of their own funds to do it with?

The Witness: They did not, Your Honor.

X-Q. 265. (By Mr. Pierson). Mr. Henkle, I believe you testified that the Produce Terminal Corporation made in one of the years—I have forgotten which year—some substantial installation of new machinery. A. Yes, sir.

X-Q. 266. Did they get the funds from the Maine Company with which to install that new machinery? A. The Pan Corporation furnished money to put in a new pulverizing system, coal pulverizing system, and some other new and extensive equipment.

The Produce Terminal was adding to its equipment from time to time, as it could, out of its funds but not to an extent that was necessary at the time the Pan Corporation installed the machinery.

X-Q. 267. And at the same time the Produce Terminal Corporation was paying out substantial dividends, in these

years? A. Yes, sir; and the dividends were going to the same source from which we received the money back.

X.Q. 268. Mr. Henkle, with regard to the reports which have been introduced in evidence as Petitioner's Exhibits 11 and 12: In submitting those reports by the Produce Terminal Corporation, did they not go direct to the New Jersey Company first?

Mr. Welch: Have the exhibits both been admitted?

The Member: If they have not been admitted formally they may be received at this time.

(The document so offered and received in evidence, was marked "Petitioner's Exhibit 11," and made a part of this record.)

The Witness: What was your question?

(Question read.)

A. They go to the New York office or the Boston office, wherever we are directed to send them; two copies.

X.Q. 269. (By Mr. Pierson). And in what manner does the Maine Company request those reports from the Produce Terminal and the Transit Company? A. Well, they have had them so long that I have no recollection of the original request, but I have no doubt we were instructed originally many years ago to send them every month.

The Member: Let me ask you: Looking at this printed form—if I may interrupt you, Mr. Pierson, without any inconvenience?

Mr. Pierson: Yes, it is perfectly all right.

The Member (Continuing): —looking at this printed form I am led to ask the question as to whether this report is designed primarily to answer a demand of the Commerce Commission for such a report.

The Witness: That is correct, Your Honor.

The Member: Who is it that devised the form, the printed form of this report?

The Witness: There is a form of report that is required by the Illinois Commerce Commission, and that also goes to them and is in their form, as you have stated.

The Member: Do you make a report as well to the Interstate Commerce Commission; that is, does this corporation?

The Witness: We make an annual report, Your Honor.

The Member: Now I ask you, then, whether this report which is in evidence as Petitioner's Exhibit 11, called "Summary of Operations for the Month of December, 1933," is prepared primarily because of the Illinois Commerce Commission's demand and is a report in the first instance to that Commission?

The Witness: That is correct, Your Honor.

The Member: And when you speak of a report to the Maine Corporation or to the New Jersey Corporation, or anyone else, am I correct in my understanding that you mean simply that copies of the report that you make to the Illinois Commerce Commission are sent to these eastern offices?

The Witness: That is correct, Your Honor.

The Member: You don't prepare them for the purpose of making a report to the eastern offices but only to send them a copy of the report sent to the Commission; is that correct?

The Witness: That is correct, but we would have to prepare one for them if we didn't have this report.

The Member: That is, you think you would. You don't know whether you would make the same report or not, do you?

The Witness: That is correct, Your Honor.

The Member: Is that also true as to Exhibit No. 12?

The Witness: Yes, Your Honor.

The Member: All right.

X-Q. 270. (By Mr. Pierson). Mr. Henkle, I show you a report which is designated here as the Union Stock Yard and Transit Company of Chicago Live Stock Report. Are you familiar with that, and will you state to the Board just what it is? A. This is the seventy-second annual Live Stock Report of the Union Stock Yard and Transit Company of Chicago for the year 1937 and summaries for 1865 to 1937.

X-Q. 271. And this is your name which appears on the first page under the cover? A. Yes, sir.

Mr. Pierson: I would like to have that marked for identification, Your Honor.

The Member: Aren't you going to offer it?

Mr. Pierson: Not at this time. I will offer it later.

The Member: For identification, what, Mr. Clark?

The Clerk: This will be Respondent's Exhibit A, for identification.

X-Q. 272. (By Mr. Pierson). Now, Mr. Henkle, I show you the document which you have just described and which has been marked for identification as Respondent's Exhibit A, and call your attention to the figures contained on page 5 and beginning with the year 1911.

Will you examine those, please, and state to the Board just what they are.

Mr. Welch: If Your Honor please, it sounds to me as if this is being treated as though it were in evidence, and I doubt if I have any objection to it, but—

Mr. Pierson: I beg your pardon (handing document referred to to Counsel for the Petitioner).

I beg your pardon.

Mr. Welch: There can be no objection to its going into evidence, sir.

The Member: That is why I asked. I think there is an awful lot of time wasted by marking them for identification first, especially when there is no objection, and then offer-

ing them later. You might just as well put them in in the first place.

Mr. Pierson: All right, Your Honor.

I will offer it in evidence.

Mr. Welch: No objection.

(The document so offered and received in evidence was marked "Respondent's Exhibit A," and made a part of this record.)

Mr. Pierson: What was the last question, Mr. Reporter? (Last question read.) A. This is a table of receipts of stock by species for 72 years.

X-Q. 273. (By Mr. Pierson). After examining this—and that states as to the type of live stock which you received; is that correct? A. Yes, sir; cattle, calves, hogs, sheep and horses.

X-Q. 274. Mr. Henkle, reading down in the second column, isn't it a fact that in 1930 to 1933 the amount of live stock receipts in all of those years was less than in the years 1917 through 1920, and from 1922 through 1926? A. Well, Mr. Pierson, you can't judge by the second column as the receipts of live stock. There is another table that shows the receipt of all live stock.

The column at which we are looking is cattle, alone.

Mr. Welch: Mr. Pierson, may I interrupt?

I have a copy, too; would Your Honor like to follow?

The Member: Not until I need it.

X-Q. 275. (By Mr. Pierson). With respect to the cattle, which is contained in that second column. A. What is the question?

X-Q. 276. That is, in the years 1930, 1931, 1932, and 1933 the amount of receipts were less than in the years just previously mentioned; that is, 1917 to 1920? A. That is correct.

X-Q. 277. And also 1922 to 1926? A. That is correct.

X-Q. 278. That is likewise true, isn't it, Mr. Henkle, with regard to calves received? A. That is correct.

X-Q. 279. And also true with respect to hogs received? A. Well, the receipts of hogs in 1911 are less than they were in 1933 but in 1924 they were very much greater. That is in the middle column.

X-Q. 280. Yes, sir.

Now, with respect to sheep? A. They were very much less in 1930 to 1933 than in 1911, although the receipts had varied between those two periods.

X-Q. 281. Now, is that likewise true with respect to horses? A. Yes; the horses are very much less.

X-Q. 282. Now, Mr. Henkle, after examining this report do you still want to state to the Board that your facilities were in 100 percent use in these years 1930 to 1933? A. I haven't made any such statement.

X-Q. 283. Just what is the condition, then, in 1930 to 1933 with regard to use of facilities in the stock yards? A. We have sufficient facilities, such as they are, for handling the business that we have today.

X-Q. 284. And you have excess facilities there, do you not? A. No, I wouldn't say so.

X-Q. 285. Well, you could handle, according to your statement, you could handle an amount back in these years which was greatly in excess of the amount which you are now handling, in 1930 and 1933. A. I did, but I didn't tell you the conditions under which you handle 122,000 hogs. If the capacity of the Willard Hotel is a thousand people with two in the room, if you put four in the room the capacity would be greatly doubled, and if you put them on cots in the halls you would be still having a greater number, and that is what we have to do when we have these large runs of hogs. We wouldn't have suitable facilities for handling 122,000 hogs if we had other species of animals there the

same day, and if we didn't use the chutes and alleys and the streets and every available part of the property for it. We wouldn't figure we had facilities for doing that properly.

X Q. 286. Do I understand you to mean by that, Mr. Henkle, that you use every available building and every available part of space in the stock yards, at the present time? *A.* No, sir; we do not; we never did.

The Member: Can you answer the question categorically as to whether during the period beginning in 1930 and ending at the end of 1933 you had at that time facilities in excess of the necessities of your business? That is to say, the necessities as evidenced by the number of live stock which you were called upon to handle?

The Witness: No, I don't consider that we had facilities in excess of what we would have to take care of emergencies and unusual situations.

The Member: No; to take care of the business that you had? Did you have facilities in excess of what you needed to take care of the business that you had?

The Witness: We did at times, Your Honor; yes, sir.

X Q. 287. (By Mr. Pierson). And that is during the years 1930 to 1933? *A.* That is correct, but we still didn't have our new hog houses.

The Member: We will take a short recess for five minutes. (There was a short recess taken.)

X Q. 288. (By Mr. Pierson). Mr. Henkle, when Transit Company and Produce Terminal Company came to the assistance of the banks, did they purchase the securities at prices greater than the then existing market value of those securities? *A.* They did.

X Q. 289. And, Mr. Henkle, the transaction, then, wasn't one entered into for profit on behalf of those corporations? *A.* No, sir.

Mr. Welch: Just a moment. I think that is objectionable

and that is a question of law, and I should like to have the question and answer stricken out.

The Member: I will deny that motion. It is not an issue in this case and therefore the question as to whether it is a question of law or not isn't involved here. Were it not for a statute, I should think that any witness in a position to know the facts would be permitted to testify as to whether a transaction is entered into for profit. The legal construction is not in issue in this case, so it doesn't seem to me that it is a question of law.

Mr. Welch: Well, I then have this difficulty with the word "profit." The witness has testified that the transaction was entered into for the benefit of the companies that were interested in seeing a sound bank adjacent to the stock yards. Now, the word "profit" as used, then, this way is sort of double-barreled, and I have that difficulty, if Your Honor follows me.

The Member: I think I follow you, and it seems to me that if you are correct on it, that makes the question and answer entirely harmless and innocuous. Whether you are right or not, I am not saying, but if you are correct it seems to me it is not necessary the answer be stricken.

X-Q. 290. (By Mr. Pierson). Mr. Henkle, when these purchases were made by the Transit Company and Produce Terminal Company of the securities, and the banks were assisted by the purchase of the securities, the other creditors and the stockholders got the benefit just the same as the Produce Terminal and Transit Company, did they not?

The Member: Well, I should think that was a question that the witness is wholly incompetent to answer.

Mr. Pierson: Well, I will strike that question. (By Mr. Pierson). Mr. Henkle, was it required by anyone that you make these investments in the banks?

Mr. Welch: Just a moment.

If Your Honor please, that seems a very blind question to me. I don't quite understand it myself.

The Member: Do you understand the question, Mr. Witness?

The Witness: I do not, Your Honor.

Mr. Pierson: I will restate the question.

X-Q. 291. (By Mr. Pierson). Mr. Henkle, then the purchase of these securities by Produce Terminal and Transit Company was a purely voluntary act on the part of those companies; is that correct? *A.* Well, I assume that the assistance they were extending to the bank would rather be involuntary. We thought it was necessary, and we did it, but we wouldn't volunteer to do anything of that kind.

X-Q. 292. But its purpose, as I understand you have previously testified, was to keep the banking facilities there? *A.* That is correct.

X-Q. 293. And Produce Terminal and Transit Company wanted the banking facilities there, and they voluntarily made these purchases in order to see that they remained there? *A.* I believe that is correct, Mr. Pierson.

X-Q. 294. Now, that is likewise true with the subordinated funds, is it not, Mr. Henkle? *A.* Well, we are entering into a banking question that I am not particularly qualified to discuss.

X-Q. 295. I don't mean to go into the technical phase of it at all. I mean that so far as putting up the subordinated funds in supporting the banks is concerned, that was a voluntary act on the part of Produce Terminal and Transit Company, and they weren't under any compulsion to do that? *A.* No.

X-Q. 296. From anyone? *A.* No.

Mr. Pierson: That is all.

Mr. Welch: I have one or two questions that I would like to ask.

Redirect Examination.

Q. 297. (By Mr. Welch). Mr. Henkle, will you refer to Exhibit 12, which I think is before you, and which is the form of report that Transit Company sends to the Maine Company? Will you tell us, please, sir, who designed that report? *A.* This report in its present form has been developed over a long course of years by our own auditors and by President Leonard for our information in operating the company.

Q. 298. Speaking again to Exhibit 12, is a report in that precise form required by any regulatory body? *A.* No, sir.

Q. 299. Mr. Henkle may I return for a moment to the facilities at the yards in the years 1930 to '33? I think I should have asked you on direct if there has been a change during the past 10 or 15 years in the method in which live stock arrives at the yards? *A.* There has been a great change. Formerly a very large proportion of our receipts came by railroad, and many of them in train lots, but nowadays a large proportion of our receipts are received in trucks. These trucks require—it requires two or three trucks to have as much as a carload, and each truck averages between two and three owners. In other words, there is a tremendous number of small lots, and the handling of these animals requires not only large spaces for the big trucks to manipulate in the center of the yards, but suitable unloading platforms and pens, and smaller pens in which these cut-up lots may be handled. And if we have a run of 1200 trucks, we will say, in one morning it requires different and a great variety of facilities for handling all of those small lots of species.

Q. 300. Taking the years '30 to '33, how many trucks may or did, in fact, arrive on occasions in days through those years? *A.* It seems to me we had in that period more than 1200 trucks—more than 1200 trucks in one day.

Q. 301. Is the flow of live stock into the yards somewhat seasonal? *A.* It is seasonal and it is also irregular in season. In the fall of the year, we have the arrivals of the cattle from the western ranges that have grazed there all summer. They come in train lots and from long distances and are handled in large pens and in a separate section of the yards. Then at other times we may have heavy runs of cars of hogs at some different periods, but nobody knows when those periods may occur or whether there will be unusually large arrivals of all species or a particular species. The pens are designed for cattle pens, hog pens, and sheep pens, and are not entirely suitable for interchangeable use.

Q. 302. Taking the years 1930 to '33, inclusive, will you tell us whether or not in each of those years at some time throughout the year every section and every facility in the yards was used? *A.* At some time during the year all of our facilities are used at various times, but they are not used continuously, any of them.

The Member: Well, are they ever used and during those three or four years were they ever all used at once?

The Witness: There have been many times when all of the cattle pens would be used for cattle and at other times, not necessarily the same time, all of the hog pens would be full of hogs, and the same is true of the sheep, but they may not be—they may not arrive all at the same time, the heavy runs of the species.

Q. (By Mr. Welch): You were asked about the participation of the Transit Company and the Produce Terminal in coming to the assistance of these banks. *A.* Yes, sir.

Q. 304. And you were asked whether you were under any compulsion from any source as to what was done.

The Member: No. I am sorry to correct you. He was asked whether he was under any compulsion from anybody.

Q. 305. (By Mr. Welch). From anybody. Do you remember that question, sir? *A.* Yes, sir.

Q. 306. Did the Maine Company have anything to say as to what you should do or not do in respect of those transactions? *A.* Certainly.

Q. 307. And what did it have to say? *A.* Why, we had to consult with them as to whether we could do it or not.

Q. 308. And your orders came from where? *A.* From Mr. Prince.

Mr. Welch: I think that is all on this go-around, Mr. Pierson.

Mr. Pierson: Just a moment, Your Honor.

The Member: I think that is important.

Were you here when Mr. Pierson was making his cross-examination of this witness?

The Reporter: Yes, sir.

The Member: Will your read the last question of Mr. Pierson's? (The record was read as follows: "*Q.* I don't mean to go into the technical phase of it at all. I mean that so far as putting up the subordinated funds in supporting the banks is concerned, it was a voluntary act on the part of Produce Terminal and the Transit Company, and they weren't under any compulsion to do that? *A.* No. *Q.* From anyone? *A.* No.").

The Member: "From anyone."

Recross-Examination.

X-Q. 309. (By Mr. Pierson). Mr. Henkle, exactly what did the Maine Company say with respect to this? *A.* Well, they gave us authority to do it.

X-Q. 310. Was that written authority? *A.* No, sir.

Mr. Pierson: That is all.

Mr. Welch: That is all, Mr. Henkle.

The Member: Now, let me get this entirely clear. Your conduct as to the assistance to the banks, if I understand you correctly, was actuated by your own feeling of the economic necessity for you to do that?

The Witness: That is correct, Your Honor.

The Member: You weren't told by anyone who had any authority over you that you had to do it?

The Witness: That is correct.

The Member: You decided it all for yourself?

The Witness: We acted—well, we decided that it was necessary.

The Member: I mean to say, your company, the officers of your company were the ones who decided to do this?

The Witness: It was in our opinion necessary, and we asked for authority to do it.

The Member: And it was necessary only because of your economic interests to do it, wasn't it?

The Witness: I think that is correct.

The Member: You were in a position where you could have decided not to do it or decide to do it as you in your own individual wisdom thought it was wise to do; is that correct?

The Witness: No, we could only have made that recommendation, Your Honor.

The Member: Well, explain that.

The Witness: Well, we would consult with Mr. Prince as to whether he agreed with our recommendation and our opinion that it was absolutely necessary to be done.

The Member: Now, did anybody make any threat about it that required you to do it or else?

The Witness: No, sir.

The Member: Suppose you hadn't done it? Did you have any judgment at that time as to what would have happened to your interests if you had not done it?

The Witness: Well, we were sure it would be highly detrimental to our interests and the interests of our market if the condition was not corrected. It was complained of by the banking authorities and something had to be done about it or we wouldn't have any bank there.

The Member: Now, your own interests would have suffered, I take it, by reason of the fact that your customers would not have had the facilities ready at hand with which to finance their transactions; is that right?

The Witness: That is correct, sir.

The Member: Now, is that substantially the whole story?

The Witness: I think it is, sir.

The Member: All right. Have either one of you anything further?

Mr. Pierson: That is all, Your Honor.

Mr. Welch: Well, just one more question in line with His Honor's—

The Member: I don't want this subject to be left in the realm of a mere characterization by one person or another by the mere use of words. I want to find out what the substance is. Whether a thing is voluntary or whether a thing is under compulsion has a thousand connotations that I don't want to leave in the air.

Mr. Welch: That is all, sir.

The Member: Stand aside. (Witness Excused.)

The Member: Your next witness, Mr. Welch?

Mr. Welch: Mr. Austin, will you please take the stand?

MR. JOHN W. AUSTIN.

called as a witness by and on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Welch). Have you yet stated your name, sir? A. My name is John W. Austin.

Q. 2. And you were sworn just now? A. Yes, sir.

Q. 3. Where do you live? A. 11319 Hermosa Avenue, Chicago.

Q. 4. What do you do, sir? A. I am secretary and treasurer of the Chicago Junction Railroad Company and—

Q. 5. Let me interrupt. That is what we call the Elevated? A. The Elevated.

Q. 6. In this case? A. Yes, sir.

Q. 7. Go ahead, sir. A. The Union Stock Yards and Transit Company, the Part Corporation, the Stock Yards Harness and Saddlery Company, and assistant secretary and treasurer of the Produce Terminal Corporation.

Q. 8. Mr. Austin, I want you to tell us a little about the Railroad Company. That is the Elevated, as we try to call it here? A. Yes, sir.

Q. 9. That company, I take it, is not particularly active; is that right? A. That is correct. It was leased to the South Side Elevated Railroad.

Q. 10. Is it still operated as the—is the property still operated by them? A. It is operated by the receivers.

Q. 11. When did they go into receivership? A. In June, 1932.

Q. 12. Prior to that receivership what, if anything, did you do about the operation of the Railroad Company? A. Well, I collected the rental and deposited it with the trustees under the mortgage.

Q. 13. Is that all you did sir? A. Yes, sir.

Q. 14. Since the receivership, what, if anything, have you done? A. Well, I haven't—I, of course, haven't collected any rent. It has not been paid in at all.

Q. 15. What do you do about the interest on the bonds? A. Well, I get an amount from the Jersey Company which guaranteed the bonds.

Q. 16. And then pay the interest? *A.* And pay the interest to the trustees under the mortgage.

Q. 17. What has this railroad company, this elevated structure, in the way of assets? *A.* Well, it has the structure, the elevated structure only.

Q. 18. And no other assets? *A.* That is all.

Q. 19. Has the Railroad Company any other income, or ever had any other income other than the rent that you used to get from the South Side Elevated? *A.* It has not.

Q. 20. What transportation service does this Railroad Company, the Elevated, furnish? *A.* Well, that is the means by which employees of the stock yards and Packingtown that arrive by street car or elevated get to the Packingtown or the stock yards. It has—

The Member: Tell me, is Packingtown anything more than a vernacular for the community? Does it have any political or municipal significance?

Mr. Welch: It does not. The vernacular is used to mean packing houses west of the stock yards. That is in the vernacular referred to as "Packingtown," but it is pure vernacular.

Q. 21. (By Mr. Welch). Had you finished your answer? *A.* Well, then, I was just going to explain that the line runs into the yards and runs around Packingtown. It serves a territory that has no other street car or elevated service at all.

Q. 22. Mr. Austin, if some disaster such as a fire, or anything of that sort were to overtake the elevated structure, and it had to be rebuilt, what, if anything, could the Railroad Company do about it? *A.* Well, there is nothing to do but take the matter up with the Maine Company, have the Maine Company rebuild it and furnish the funds.

Q. 23. Have you noticed the market on the bonds of this

Railroad Company for the years 1930 to '33? A. I knew the market.

Q. 24. What has it been? A. At par or better.

Q. 25. Can you tell us, sir, how the bonds happen to be selling at par on a road that is in receivership? A. That is because they are guaranteed by the Jersey Company.

Q. 26. Now, let me turn to the Railway Company. What is your position in that concern? A. I am secretary and treasurer.

Q. 27. That also is a lessor? A. That is correct.

Q. 28. Take the years 1930 to 1933, if you will, and tell us what your duties were in connection with the Railway Company. A. Well, I collected the rent.

Q. 29. From whom do you collect it, sir? A. From the New York Central.

Q. 30. How often does it come in? A. Generally quarterly.

Q. 31. Do the checks come to you? A. Yes, sir.

Q. 32. When they reach you what do you do with them? A. I deposit them in the bank account.

Q. 33. And in what way do you disburse those funds? A. The funds are all disbursed for dividends except an amount of expenses and some cash left in the bank.

Q. 34. And under whose instructions are they disbursed as dividends? A. They are disbursed as dividends under the instructions of the Maine Company.

Q. 35. You spoke of depositing funds. Who selects the banks in which you make your deposits? A. That is selected by the Maine Company also.

Q. 36. Is there anything else that the Railway Company does, Mr. Austin? A. Well, yes, they make the lessors' Interstate Commerce reports.

Q. 37. Now let me ask you this, Mr. Austin: Take the years 1930 to 1933. What would have been the situation of

the Railway Company if the New York Central lease had been voided or in some way came to an end? A. Well, the railroad would have to have been operated, or at least until we could have found a new lessee.

Q. 38. Does the Railway Company have any equipment? A. None at all.

Q. 39. In the years 1930 to 1933 did it have any funds with which it could buy equipment? A. Well, not sufficient to run a railway.

Q. 40. Could the Railway Company borrow funds in those years? A. No, they couldn't.

Q. 41. Why do you say that, sir?

Mr. Clark: Just a moment, Your Honor. It seems to me this is all immaterial because the company is under lease and has been. I don't know whether Your Honor would feel that it might have any bearing on the issue, but it seems to me it is wholly immaterial.

The Member: Of course the hypothesis as to what it would do under assumed circumstances is of very slight consequence, but as to whether it does have equipment and whether it has facilities with which it could operate, those are factual and they seem to me to be not objectionable.

Mr. Clark: That is true.

The Member: These hypothetical questions, if they were to go to any substantial extent I would stop them, but if they don't I will let them go along.

Mr. Welch: I have practically finished.

Q. 42. (By Mr. Welch). You stated, I think, a moment ago that the Railway Company could not borrow money. A. That is correct.

Q. 43. Can you tell why that is? A. Within the mortgage of the Jersey Company there is a covenant forbidding it to borrow money on it.

Mr. Welch: I would like to call Your Honor's attention

on page 13 of the Jersey Company's mortgage, which is S 24, there is a covenant by which the Jersey Company covenants that the Railroad shall never borrow money.

Mr. Clark: Of course that depends entirely on the wording of the document itself.

Mr. Welch: I am only calling His Honor's attention to the fact, whatever it is worth.

Q. 44. (By Mr. Welch). If, Mr. Austin, any need for money on the part of the Railway Company should arise, what, if anything, could you do about it? A. We could do nothing but request it of the Maine Company treasurer.

Mr. Welch: Mr. Clark, at this time I should like to offer these two (handing documents to Mr. Clark).

Mr. Clark: I would like to ask, Your Honor, the purpose.

The Member: There has been nothing stated of record of what has been going on, at all.

Mr. Welch: I thought and still think Mr. Clark will agree to it. These are decisions of the Interstate Commerce Commission having some bearing on this New York Central lease and I thought it would be a convenience for later arguments about them, if they were put in evidence. There is to be no—

The Member: There was a time when the record was suspended when you gentlemen did some conferring and I don't want any loose ends.

If you are resuming the record, let us have some offer or statement to which this conversation can be directed.

Mr. Welch: I offer in evidence decision of the Interstate Commerce Commission in the Chicago Junction case, Finance Docket No. 1165; application of the New York Central Railroad Company for approval of purchase of stock, lease of property and option to purchase stock on property. Decided May 16, 1922.

The Member: Have you the citation? It probably appears at the bottom of the page.

Mr. Green: 71 I. C. C. 631.

The Member: Is there any objection to that, Mr. Clark?

Mr. Clark: All I would like to do is to ask the purpose so that we may have it as a matter of record.

Mr. Welch: The purpose of offering this docket is, it is a decision affecting the New York Central lease and on this decision there will be argument, perhaps orally, and certainly in the brief.

Mr. Clark: I have no objection.

The Member: It is received.

(The document so offered and received in evidence, was marked "Petitioner's Exhibit 13," and made a part of this record.)

Mr. Welch: And, similarly, I offer in the same docket No. 1165, Chicago Junction case, a decision of the Interstate Commerce Commission, dated December 3, 1928, and Mr. Green will furnish the citation.

Mr. Green: 150 I. C. C. 32.

The Member: Any objection?

Mr. Clark: No objection.

(The document so offered and received in evidence was "Petitioner's Exhibit 14," and made a part of this record.)

Mr. Welch: You may examine, if you wish.

Cross-Examination.

X-Q. 45. (By Mr. Clark). You stated that dividends of the Railway Company were disbursed only on authority of the Maine Company? A. Yes, sir.

X-Q. 46. How was that authority received by Railway? A. Through the president.

X-Q. 47. Well, was there any written authority; any written instruction, anything of that sort? A. I have not seen the written instruction; no, sir.

X-Q. 48. You don't know of anything? A. I don't know of any written instructions; no, sir.

X-Q. 49. Were there any verbal instructions? A. Yes, sir.

X-Q. 50. By whom? A. Through the president.

X-Q. 51. I say, by whom? A. By F. H. Prince.

X-Q. 52. To whom did he give those verbal instructions? A. To Mr. Leonard.

X-Q. 53. How do you know? Were you present at the conversations? A. No; I have heard the matter discussed many times.

Mr. Clark: Well, then, I ask the evidence be stricken, Your Honor.

The Member: I will take into consideration the fact it is entirely hearsay.

Mr. Clark: Very well.

The Member: I don't suppose I could do that, very safely. I could strike and take into consideration all these cross-examination answers; I take it that is really not what you meant, is it? You want to strike the direct examination answers to which your cross-examination refers and I can't identify those answers.

Mr. Clark: I think you are quite correct and I am very sure Your Honor will take into account the effect of the cross-examination relative to that direct testimony.

The Member: That doesn't affect the fact, of course, that the dividends were declared and paid, which, after all, is the crucial fact. The instance at which that was done, is only what appears on cross-examination through this witness' hearsay testimony. That is as far as it goes.

X-Q. 54. (By Mr. Clark). Referring to Railroad Company, Mr. Austin; is the receiver under obligation to pay the rental?

Mr. Welch: Just a moment. I suppose that would be a legal question. I don't, myself, know the answer.

The Member: Yes.

X Q. 55. (By Mr. Clark). Let me ask, then, whether the rental was treated as an accrual by the receiver, if you know? A. I don't know how they treat their rental.

Mr. Clark: No further questions.

Mr. Welch: Nothing further, Mr. Austin.

The Member: May step down. (Witness excused.)

Mr. Welch: Mr. Hackett.

MR. RICHARD HACKETT.

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Welch). What is your full name, Mr. Hackett? A. Richard Hackett.

Q. 2. You were sworn just now? A. Yes, sir.

Q. 3. Where do you live, Mr. Hackett? A. Drake Hotel, Chicago, Ill.

Q. 4. What do you do? A. I am general manager of the Central Manufacturing District.

Q. 5. Are you connected with any of the other corporations that are in this whole enterprise? A. I am traffic manager of the Union Stock Yards and Transit Company. I am a director of the Chicago Junction Railway Company.

Q. 6. When did you become associated with the Central Manufacturing District? A. December 1, 1927.

Q. 7. What had you done prior to that, sir? A. Prior to that I was western traffic manager of the New Haven Railroad in Chicago.

I came to Chicago in 1924. Prior to that I was assistant

vice president in charge of traffic at New Haven, Conn. I was with the New Haven Railroad about 28 years.

Q. 8. And I take it your life has been chiefly that of a railroad man. *A.* Yes, sir.

Q. 9. Did that fact have any bearing on your going to the Central Manufacturing District? *A.* My railroad experience was an important element in my equipment for the work that I now do.

Q. 10. Why was that so, Mr. Hackett? *A.* Because it calls for considerable contact with railroad representatives.

Q. 11. Now, what are your duties in Central Manufacturing District? *A.* I have entire charge of the actual operation of the property.

Q. 12. And what are those operations, Mr. Hackett? *A.* Well, we sell or lease land for use by industries requiring side-track connection, direct side-track connection for the handling of freight by rail.

We furnish the money and erect buildings to suit the needs, the requirements of the business concern and lease them or sell them on a 15-year basis.

We manage all the real estate owned by us.

Q. 13. When you sell or lease vacant land do you impose any requirement on the purchaser or lessee? *A.* Yes, sir.

Q. 14. What requirement? *A.* Always that the purchaser will erect a building.

Q. 15. Why do you make that requirement? *A.* One of the principal objects of the development of the Central Manufacturing District has been to build up the tonnage of the Chicago Junction Railway. As a result we are always anxious to obtain business concerns that will actually produce tonnage for that railroad.

Q. 16. Would you, Mr. Hackett, describe first a typical transaction where you sell some vacant land; and, let us say, you erect the building for the purchaser? *A.* When

a concern is looking for a site in Chicago, whether it is a concern in Chicago or from outside, we endeavor to interest them in the Central Manufacturing District and if successful we draw the plans to their specifications and send the plans out for bids.

We furnish the money for the erection of the building. When it is completed it is turned over to the purchaser and as soon as he takes possession, if it appears to be or happens to be a purchase contract, his interest payments and his amortization payments begin. They are usually on a 15-year basis with interest at 6 percent on the unpaid balance.

The payments are arranged either on a monthly basis, semi-annually, or annually, whichever suits the requirement of the industry.

We also erect buildings to specifications and lease them to industry on a 15-year basis.

Q. 17. When you build a building for a customer on what you call this 15-year period of amortization and interest, at the end of the 15 years who owns the building? *A.* The purchaser.

Q. 18. In the meantime, how about the taxes; who pays those? *A.* The purchaser pays taxes.

Q. 19. Mr. Hackett, I would like it if you would describe the Central Manufacturing District to us, if you will.

Perhaps His Honor would let you step over to the map, if you would like to. (The witness steps over to the map, as requested.)

Q. 20. And in your testimony, now, you are about to refer to Petitioner's Exhibit 3, are you not? *A.* Petitioner's Exhibit 3; yes, sir.

One of the important features of the development of the Central Manufacturing District has been the Chicago June-

tion Railway. You see it goes all through the district (indicating).

Each industry in the district has an individual side track and that side track leads out, as you will see here (indicating) into this net work of rails.

The result is that any industry in the district may load or can load at its loading platform a carload of freight and send it direct by rail to any point in the United States.

The district is bounded on the south by Thirty-ninth Street; on the east by South Morgan Street; on the north by Thirty-fifth Street, and on the west by South Ashland Avenue. That is the original Thirty-fifth Street district.

Q. 21. Roughly, what is the area of that original district? *A.* About 220 acres.

Q. 22. Now, there is another part of the district? *A.* Yes. We have over here (indicating) the so-called McKinley Park, or Thirty-ninth Street district.

Q. 23. When you say "over here"— *A.* That is, to the west and south of the original Thirty-fifth Street district.

Q. 24. And along what street, sir? *A.* Along Thirty-ninth Street, or Pershing Road.

Q. 25. And to the southerly side of it? *A.* Southerly side, yes, extends for a mile from South Ashland Avenue almost to Western Avenue and it contains about 92 acres.

You will notice that the lots in this district extend from Thirty-ninth Street back to the railroad with the result that each one of these lots is actually served on the rear by main-line track facilities into which these side-tracks load.

Q. 26. I think that will do, from the map, unless you have something else. *A.* That is all I have to suggest, Mr. Welch.

Q. 27. I did want to ask you something more from the map, Mr. Hackett, if you will come back, because I am not sure it has been testified to.

There is different coloring in the map in the area of the Central Manufacturing District. Will you tell us what the different colors represent? A. You will note—I don't know that His Honor can see it—that some of these portions are plain and others are sort of cross-hatched. The plain section represents the property which has been sold. The cross-hatched pieces show property that is still owned or leased by the District. We own it and it is not occupied, or we own it and it is leased, including, also, the private streets.

Q. 28. You own all the streets, do you, sir? A. We own all of the streets. They are all private streets, in our district.

Q. 29. Do you police them? A. We police them, maintain them, and repair them.

We also own the utilities, sewers, water mains, and electric lights.

Q. 30. Thank you, sir. I think you can go back to the stand. (The witness resumed the witness stand.)

Q. 31. You spoke of the district line on the southerly side of West Pershing Road as having been acquired somewhat later than what you called the original district, chiefly lying to the north of the stock yards itself. A. Yes, sir.

Q. 32. When was that portion of the district to the west and lying southerly from West Pershing Road acquired? A. In the year 1916.

Q. 33. And I take it from the map that that is also being developed? A. That is being developed; yes, sir.

Q. 34. And has been, already? A. It has been. There is still some vacant land to be sold or leased.

Q. 35. Now, would you take a moment or two, Mr. Hackett, and tell us what type of industry you find in the district? A. Only the highest type of light manufacturing or ware-

house activity. We don't take heavy-duty industries into the district.

Q. 36. Could you give us the names of some concerns that we might recognize that are located in the business? *A.* William Wrigley, Jr., the chewing gum manufacturer, is one.

Westinghouse Electric Manufacturing Company is another.

The Continental Can.

The United Drug.

The Great Atlantic & Pacific Tea Company.

The United Government Warehouses that serve the Sixth Corps Area.

The Goldblatt Brothers. They are not nationally known but are one of our biggest tenants, one of the biggest department stores in Chicago.

The Standard Sanitary Manufacturing Company, which is a subsidiary to the American Radiator.

Loose-Wiles Biscuit Company.

Standard Brands, formerly the Maxwell House Coffee, and a number of others.

Q. 37. I think you mentioned some United States Government building or set of buildings, didn't you, Mr. Hackett? *A.* Yes, sir.

Q. 38. Tell us about that, if you will. *A.* That is what they call the warehouse for the Sixth Corps Area. It supplies the War Department needs to its various posts in Illinois, Wisconsin, and Michigan.

Q. 39. And does that lie, Mr. Hackett, along the southerly side of Pershing Road? *A.* Yes, sir.

Q. 40. At that portion of the map where "district" appears? *A.* That is right.

Q. 41. About, roughly, what is the frontage of those

buildings on the street, if you recall? A. I would say, roughly, about 600 feet. I am guessing.

Q. 42. Do you know why that location was selected for the army corps? A. It was selected after a very exhaustive investigation by the War Department for the purpose of finding property so located that it could give the best possible service either in time of peace or in time of war to the Sixth Corps Area.

Q. 43. Mr. Hackett, have you at my request prepared a little folder of pictures of some of the buildings in the area? A. Yes, sir.

Mr. Welch: These are quite reduced in number and I don't expect but a few moments of testimony about them, but if there is no objection I should like to offer them and have him tell us about them.

Mr. Clark: No objection.

The Member: You are offering the whole book?

Mr. Welch: The whole book.

The Member: It may be received.

(The book so offered and received in evidence was marked "Petitioner's Exhibit 15," and made a part of this record.)

Q. 44. (By Mr. Welch). Mr. Hackett, referring to Petitioner's Exhibit 15, which is a folder of pictures, will you hold those so that His Honor can see them, if he has any interest in them, and then run through rather quickly, just telling us what they are. A. No. 1 is the Jewel Tea Company. They are a chain store organization.

No. 2 is the United States Cold Storage Corporation. That is one of the largest cold storage plants in the country.

No. 3 is William Wrigley, Jr., looking at it from the southeast to the northwest.

No. 4 is the Standard Brands, formerly Maxwell House Coffee.

No. 5 is the

The Member: Do you mean that, Standard Brands, formerly Maxwell House Coffee?

The Witness: Yes; Standard Brands bought it from Maxwell House Coffee.

The Member: I thought General Foods bought Maxwell House.

The Witness: No, I am quite sure—

The Member: Maybe I am wrong.

The Witness: The building is labeled "Maxwell House Coffee" and I think—

The Member: That is enough.

A. (Continuing) The No. 5 is the Republic Food Products Company.

No. 6 is the Continental Can, the old building that we built for them and they purchased 3 years ago, plus their addition.

No. 7 is the Loose-Wiles Biscuit Company. We erected that building and they leased it for 25 years and then later bought it.

The next one is the Goodyear Tire & Rubber Company building.

Q. 45. (By Mr. Welch). Instead of "the next one," give us the number for the record, if you will. A. No. 8. Pardon me.

No. 9 is our power plant on Thirty-ninth Street which serves all of the buildings in that district with steam and electric current and sprinkling service.

No. 10 is the Walgreen Drug Company's building, over 300,000 square feet. We built and leased it to them.

No. 11 is the Westinghouse Electric Manufacturing Company's building on Pershing Road.

The Member: Why do you call that "light manufacturing"?

The Witness: Well, that is only used, Your Honor, for

repairing the parts. The reason we don't want to have the heavy industries is because they have a nuisance value for a biscuit company or a food concern.

This next building, No. 12, is the Albert Pick Building. We erected that recently, about two or three years ago.

This, Your Honor, is three units of the United States Government warehouses.

Q. 46. And by "this" you mean number— *A.* No. 13. I am sorry.

No. 14 shows part of the tracks leading into the Central Storage and Forwarding Company's buildings, which are here (indicating). On the ground floor of that building is the less-than-carload freight station for the Chicago Junction Railroad. These tracks also carry along to the east of and serve the United States Government warehouses.

The Member: Give me the directions.

The Witness: This, sir, is looking from west to east (indicating), slightly northeast.

A. (Continuing) No. 15 is a view looking from the south to the north towards the Central Storage & Forwarding Company's buildings and United States Government warehouses over there (indicating). It shows a continuation of those tracks plus the make-up yard and holding yard known as the Ashland Avenue yard.

No. 16 is not very good, but that is a view of those same tracks, looking from the east or southeast to the northwest. There are the warehouses, the Central Storage warehouse, and the Government warehouses in here (indicating). It gives some idea of the network of tracks we have to serve industries in the district.

Q. 47. Mr. Hackett, I am not sure whether I asked you, but if I did, I will ask it over again.

Did you build the buildings for the Government? *A.* Yes.

sir; we erected 1,890,000 square feet in three units for the Government.

Q. 48. And were they purchased by the Government? *A.* They were purchased by the Government.

Q. 49. Mr. Hackett, roughly, how many people work within the limits of the district? *A.* Well, I don't know exactly, but the last rough check we made we figured somewhere in the neighborhood of thirty to thirty-one thousand people.

Q. 50. Would that be fairly accurate for the years 1930 to 1933? *A.* It would be probably somewhat less, but not very much less.

The Member: Which would be less?

The Witness: I mean, there would be fewer people.

The Member: This figure that you have given is for a period after that?

The Witness: The figure I gave was for the period I understood you to say before that.

Q. 51. (By Mr. Welch) Well, your rough count was for what year? *A.* Well, it was about '28 or '29, thirty to thirty-one thousand people.

Q. 52. And you think the years '30 to '33 would be somewhat less than — *A.* But not greatly less.

Q. 53. — than '28 or '29.

Is there anything else about the district, Mr. Hackett, that you would like to tell us as to how it is run and what it is? *A.* Well, the district is very much like a city within a city. We have our own banks in the district. I don't mean that we own the banks but they are there. We have our own association of business men similar to the associations or chambers of commerce. We have our own magazine, which is devoted to the interests of the tenants in the district. We are served by the Produce Terminal Company with power and light and are the only district in Chi

cago independently served. The rest of Chicago is served by the Commonwealth Edison Company. We have constructed and maintain our own sewers and water mains. We maintain police, our own private police. In fact, the general manager of the Central Manufacturing District is very much like the unofficial mayor. All of the tenants in the district come to us with their troubles, whether it is taxes or what it may be, and we try very much to do what we can to help them out.

Q. 54. Well, how, if at all, is this district related to the stock yards enterprise, Mr. Hackett? *A.* It is most intimately related to the stock yards. The stock yards, Packingtown, so-called, and the District are where they are because of that net work of tracks I pointed out on the map. They bind each one to the other and the whole to the outside world. Once you have the stock yards served by the system of tracks like the Chicago Junction Railroad, it is, in my judgment, inevitable that you should have the packing houses—Packingtown right next door to it, and inevitable that you should have the Central Manufacturing District all served by the same network of rails.

Q. 54½. Could you give us some idea, Mr. Hackett, of the extent of the trackage that appears on this Exhibit 3? *A.* There is about 21 miles of what we call main-line tracks that these locomotives run over, and about 167 miles of side tracks and holding tracks.

Q. 55. Now, I would like to go back to this army depot for a moment, if I may.

You said, I think, you built it and sold it to the Government for cash? *A.* Yes, sir.

Q. 56. So that you furnished the land and financed the construction and sold the completed building; is that right? *A.* We did.

Q. 57. Will you tell us approximately how much money was required? A. About $4,500,000.

Q. 58. Now, is that an experience that the District repeats from time to time, although perhaps on a smaller scale? A. Yes, sir.

Q. 59. Is it usual for you to build a building and be paid cash on the dot, as you were by the Government? A. No, sir.

Q. 60. What is the usual system? A. One-sixth or one-third of the cost of the land and improvements down, and the rest of it over a period of 15 years.

Q. 61. Now, let's go back, if you will, and assume we are in the year 1933, and that somebody comes to you and wants to buy a piece of property, and, let's to say, wants to put up a million dollar building on it. Will you tell us how you would have gone about it? A. Well, we would agree on the plans, draw them up and agree on the plans. The first question that would arise would be the one of finance. You can't build these buildings without having the money to do it with.

Q. 62. Well, where would you get your money? A. You are speaking now of what period? 1933?

Q. 63. 1933. 1933 we would, if it was any sizeable amount, have to appeal to the Maine Company.

Q. 64. Why not to a bank? A. Well, we couldn't borrow from a bank on our property at that time, and I don't think we can now. We were covered, as you probably know, by a bond mortgage, and banks at that time, and I think now, are reluctant to loan money on second mortgage property. You can't carry on work of this kind, Mr. Welch, without being sure that you are going to have ample funds to take care of the needs of your prospective tenants.

The Member: We will suspend until quarter after two.

(Whereupon, at 12:45 o'clock p. m., the hearing in the above

entitled matter was recessed until 2 o'clock p. m. of the same day.)

AFTERNOON SESSION.

The Division resumed hearings at 2:15 o'clock p. m.; whereupon, the following proceedings were had:

MR. RICHARD HACKETT

having heretofore been first duly sworn, was recalled to the stand, and was examined and testified as follows:

Direct Examination (Continued)

Q. 65. (By Mr. Welch) You were saying something about getting financing; is that right? *A.* That is right. I answered that question.

Q. 66. Had I asked you why you couldn't borrow money from banks? *A.* That is right; you did.

Q. 67. You had answered that question? *A.* I answered that question; yes, sir.

Q. 68. When contracts are ready for execution, a contract that calls for the erection of a building, do you execute them? *A.* No, sir.

Q. 69. Who does? *A.* They are signed by two of the trustees of the Central Manufacturing District.

Q. 70. And those trustees once more are? *A.* Frederick H. Prince, Arthur G. Leonard, and J. A. McDonough.

Q. 71. After the plans are drawn and the contract is prepared and signed; or prior to signature, what would happen then? *A.* When I know that the concern really means business, I communicate either by telephone or by letter with Mr. Prince, if he is available; if not, I confer with Mr. McDonough.

Q. 72. And in what regard do you communicate or confer? *A.* About the name of—I give the name of the company; I give his financial standing; I give the type of structure he requires and the location, in which district it may be.

In fact, I give him a resume of the highlights of the whole thing; including the financial responsibility of the concern.

Q. 73. Then what happens? *A.* I either get permission to go ahead or if they don't like my prospect, or the type of building, they will turn me down. If I am permitted to go ahead, the money for the building is furnished by the Maine Company if we have insufficient funds in the District.

Q. 74. Now, is this type of thing, Mr. Hackett, the only interest the Maine Company was showing in your operation in the years '32, '33? *A.* Oh, no, there was nothing of any importance that transpired in the District that I did not confer with the Maine Company about, whether it was a lease, a purchase, contract, failure of a lessor, a failure of a purchaser to go through with his contract, taxes, tonnages; in fact, everything of any importance I felt obligated to go to the Maine Company for instructions.

Q. 75. Do you have any system of reports to the Maine Company? *A.* We have a monthly report, which is sent to the Maine Company.

Q. 76. I show you, sir, a paper booklet and ask you if that is a sample report for the month of December, 1933. *A.* '33; yes, sir; it is.

Mr. Welch: I offer this, Mr. Clark, if I may.

Mr. Clark: I would like to ask for what purpose this was prepared in the first instance?

Mr. Welch: It was prepared for the information and action of the Maine Company where required.

Mr. Clark: Well, is it prepared for any commission of the State of Illinois?

Mr. Welch: I regret to say that it is not, from your point of view.

Mr. Clark: Very well.

Is it prepared for any other commission?

Mr. Welch: It is prepared for no commission. It is prepared for the Maine Company.

Mr. Clark: I have no objection.

The Member: These dialogues are not evidence of record. If it is important that that should be made part of the facts, it should be either agreed upon by counsel or else elicited from the witness.

Mr. Clark: I won't agree to anything.

The Member: Well, I am only concerned with the importance of having the facts in the record if you want it. You have no objection to the exhibit as for whatever it is?

Mr. Clark: No.

The Member: It is received.

What number is it?

The Clerk: Petitioner's Exhibit No. 16.

(The paper booklet so offered and received in evidence was marked "Petitioner's Exhibit 16," and made a part of this record.)

Q. 77. (By Mr. Welch). Referring to Petitioner's Exhibit No. 16, Mr. Hackett, is that a sample of a report that was sent by the Central Manufacturing District to the Maine Company throughout the years 1930 to 1933? A. Yes, sir.

Q. 78. And how often, sir? A. Once a month.

Q. 79. Is that report required by any regulatory body of any sort whatever? A. None whatever.

Q. 80. May I ask you, Mr. Hackett, who selects your bank depositories? A. The Maine Company.

Q. 81. Was that true, the selection of the bank depositories, through the years 1930 to 1933, what you have just stated? A. Yes, sir.

Q. 82. Have you had any occasions when you made any suggestions to the Maine Company or submitted propositions to them, that have been turned down? A. Yes, sir.

Q. 83. Can you think of one or two such that you can tell us? *A.* Well, I had a prospect. There was a radio manufacturer who wanted about 200,000 square feet of building costing about $500,000. I recommended it to the Maine Company, and Mr. McDonough turned it down.

Q. 84. Can you think of anything else that has been turned down? *A.* Oh, I cannot, Mr. Welch. I am very careful not to put up anything that I am not fairly sure, very sure, that they will approve; otherwise, I know it will be turned down.

Q. 85. Will you tell us, if you will, Mr. Hackett, the extent of your contact with Mr. Prince when he is in this country, or Mr. McDonough, through the years 1930 to 1933? *A.* Well, Mr. Prince has me on the telephone when he is in this country sometimes three and four times a day, and every day in the week, including Sunday sometimes if things are important. He comes out to Chicago about five or six times a year and spends about a week at a time, and when he is here I see him every day, maybe two or three times a day.

Mr. McDonough I contact on the telephone maybe every day, maybe every other day, but he is in Chicago or tries to be about every other week, so I see him much more frequently.

Q. 86. Have there been any occasions, Mr. Hackett, when the Maine Company is assisted in meeting the obligations of the manufacturing district? *A.* There are three that I recollect.

Q. 87. Will you tell us those occasions one at a time? *A.* Well, there was one in 1933, when they met a maturity of the District.

Q. 88. By "maturity" you mean maturity of what? *A.* Maturity of our bonds.

Q. 89. Yes. *A.* I had previously said that we had a bond

issue on the District, and they met this maturity which was due in March of $225,000, and $50,000 in interest.

Q. 90. That is one occasion, then. Can you think of another? *A.* In 1932, as I remember it, they met a maturity under our bond issue of $225,000. I think we took care of the interest ourselves.

And in 1930, we had a maturity coming due under the bond issue of about $800,000, which was also met by the Maine Company.

Q. 91. Do you know, Mr. Hackett, who made the decision as to whether these maturities should be met or the bonds refunded? *A.* That was made by the Maine Company.

Of course, under the bond issue certain maturities were required at a certain time.

Q. 92. Have you, Mr. Hackett, refreshed your recollection as to your cash in 1930 to 1933, and if you haven't can you do so from the documents on file here? I will show you the stipulation in a moment, if I may.

If you will be good enough to look at that for a moment and I will direct some questions to it.

Taking the years 1930 to 1933 and refreshing your recollection from S—

Do you see the number on the tabulation, on the tab? *A.* Yes; 30 and 33.

Q. 93. Will you tell us what was the maximum expenditure that the Central Manufacturing District by itself was in a position to undertake, let us say, for the construction of a building, any time during those years? *A.* They were not able during those years to enter into a contract of any sizeable sum. I mean by that, over a hundred or two hundred thousand dollars, without the assistance from the Maine Company.

Mr. Clark: May I ask the Reporter to read the question and answer, if you please?

(Question and answer read.)

Mr. Welch: If Your Honor please, I am under the impression that the witness referred to S-30 and S-33 when he should have, I think, referred to S-35.

Q. 94. (By Mr. Welch). And you are speaking, now, of the years 1930 to 1933 toward the end of those statements, are you not, Mr. Hackett? *A.* I wish to state that again, Mr. Welch. I am not following your question.

Mr. Welch: Strike it out. I think it is of no importance. I simply wanted to help His Honor in finding the page you are referring to, and I think he has found it.

Q. 95. (By Mr. Welch). Well, would it follow from what you have said that there was no construction during those years? *A.* Oh, no, we went right ahead and constructed buildings during those years.

Q. 96. Can you think of one of any substantial size? *A.* We signed a contract in October or November, 1932, for a building costing about $700,000.

Q. 97. Where did you get the money for that? *A.* I think we furnished three or four hundred thousand and obtained the rest from the Maine Company.

Q. 98. If you will look at S-35, which you have before you — *A.* Is S-35 this whole book?

Q. 99. No, S-35 is a little tab, and it is now on your left hand side. *A.* Yes, I have it.

Q. 100. And will you look at your statements for the years 1930 and 1933 and tell me if I am correct in saying that in each of those years you had around a million and a half to something approaching two millions in accounts and notes receivable? *A.* That is correct.

Q. 101. Couldn't you rely on those assets to produce cash to use in the construction of a building? *A.* No, Mr. Welch. Those represent purchase contracts payable over a period of years.

Q. 102. If you will look at December 31, 1933, do you see an item of subordinated funds. A. Yes.

Q. 103. What is the amount of it? A. Six hundred thousand dollars.

Q. 104. What does that item represent? A. That is money that Central Manufacturing District had on deposit in the predecessor bank to the Live Stock National Bank.

Q. 105. What had happened to that bank? A. The bank was closed by the moratorium and was not permitted to open until certain moneys were subordinated by the District and the yards and associated companies.

Q. 106. Could you, in that year, 1933, secure any of this subordinated deposit? A. No, sir.

Q. 107. Did you at that time have any anticipation that you would be able to withdraw any of those funds at any time in the reasonably near future? A. No, sir.

Q. 108. Have you been able to yet? A. No, sir.

Q. 109. Now, will you look at an item called "Unadjusted Debits for 1930, 1931, 1932, and 1933"? Do you find that item? A. Yes, sir.

Q. 110. Will you give us the amounts for the year beginning 1930 and running through 1933. A. The amount of unadjusted deposits in 1930 was $314,657.98 and for 1931, $281,726.05.

Q. 111. 1932, please? A. $744,581.68.

Q. 112. 1933, sir? A. $641,478.51.

Q. 113. What do those items represent? A. They represent real estate that is held outside our mortgage. It is real estate that we have acquired and it is very slow-moving, even for industrial real estate.

Q. 114. Now, again speaking of 1933, what were you then looking forward to in the way of needs for money? A. Well, had the feeling that about 1933 prosperity was around the corner. Most industrial building had stopped

from 1929 on to 1933, and we who were in the business looked for somewhat of a boom in 1933 and for the next few years to come.

Q. 115. When you had that in mind what resources were available to you if that demand for building rose? A. Practically none.

Q. 116. Was there anywhere you could turn, if you needed it? A. We would have to turn to the Maine Company.

Q. 117. Did you form a judgment in 1933, Mr. Hackett, as to your probable requirements for, say, the next 3 years? A. I did, sir.

Q. 118. What judgment did you then form? A. I figured we would need from one to five million dollars.

Q. 119. Did you at that time have a conversation with Mr. Prince about that matter? A. Yes.

Q. 120. Will you tell us in substance what was said by you and by him? A. When I informed Mr. Prince of what I thought our requirements would be for the next one to three years and that was from one million to five million, he said that he would do everything he could to furnish the necessary money to the District as he was quite anxious to continue to develop industries that would furnish tonnage for the Railway, but he said, "Mr. Hackett, the Maine Company has a very heavy debt coming due in 1940 which we have to meet, and I may not be able to do all that I want to do, but I will find some way to take care of the situation if I can so that the District won't be hurt by letting any good tonnage producing industry get away."

That is in substance as I remember what he said.

Q. 121. You testified, I think, that you are a director of the Railway Company? A. Yes, sir.

Q. 122. As such, are you aware of the lease of the Railway to the New York Central? A. Yes, sir.

Q. 123. And the rental is what? A. Two million dollars a year.

Q. 124. Has that lease ever been a subject of discussion between you and Mr. Prince? A. Many times.

Q. 125. Was it discussed by you and by him in the years 1932 or 1933? A. Yes, sir.

Q. 126. Taking your discussion, let us say in the year 1932, will you tell us the substance of what was said by you to Mr. Prince about that lease, and what was said by him? A. I had, of course, told Mr. Prince that I thought the District had done a very good job in building up the tonnage for the railroad, and that there was a very heavy tonnage of freight moving in and out of the District every day, and Mr. Prince said he knew that was so, but he thought there was much more that we should do.

He and I both felt a lack of confidence in the railroad situation at that time. We had studied it a great deal, and Mr. Prince, himself, stated that he was not at all sure that a receivership of the New York Central Railroad property was not in the wind.

He said, "If that happens we are much better off if we have built up the tonnage for the railroad."

I told Mr. Prince that he was right, of course, about the railroad situation, about the New York Central; that I felt if we had Government ownership, which was being seriously discussed at that time, that I doubted that even the building up of the tonnage would protect the Chicago Junction.

He stated he thought that was probably true.

The situation was very bad and drastic steps would have to be taken but, short of Government ownership, he felt the protection of the Chicago Junction Railroad lay on continually building up the tonnage of that railroad.

Q. 127. Just one other thing, Mr. Hackett: From your

experience as manager of the Central Manufacturing District, will you tell us, please, what your ordinary and reasonable needs for working capital are? A. Well, Mr. Welch, that is a pretty difficult statement. For running the District alone the operations of the District, taking care of taxes and things of that sort, I would say we need somewhere around a half million dollars, but, as I think you may know, and if you don't I will be glad to tell you, we can't wait to find out whether we are going to have money. We are got to know we are going to have money.

Competition for the industry is very keen and the District should have either in its own till or in the till of the Maine Company ample funds to take care of any industry that offers itself to u , whether it is five million, a million, or four million dollars. If it is a tonnage producing industry of the type we want, we ought to be able to take it.

That is our problem.

Mr. Welch: You may inquire.

Cross-Examination.

X-Q. 128. (By Mr. Clark). You testified, Mr. Hackett, this morning that if you had to have help for erecting these buildings, you would have to turn to the Maine Company? A. Yes, sir.

X-Q. 129. Did you turn to the Maine Company at any time? A. Oh, yes, sir.

X-Q. 130. Did you turn to Mr. Prince? A. Oh, yes, sir, if he was in this country.

X-Q. 131. Yes. Any reason why you shouldn't have turned to Mr. Prince in any event? A. Any reason why I should not?

X-Q. 132. Yes. A. No, no reason.

X-Q. 133. That is, no necessity to turn to the Maine Com

pany in the event Mr. Prince were here? A. Well, I don't distinguish, Mr.—

X-Q. 134. Well, no. Just answer me that. A. May I ask for the question again, please?

Mr. Clark: The Reporter.

(Question read.) A. No.

X-Q. 135. (By Mr. Clark). Relative to these subordinated funds about which you have testified, Mr. Hackett, did you hear the testimony of Mr.—I have forgotten his name—this morning? A. Mr. Henkle?

X-Q. 136. Yes. A. Yes, I did.

X-Q. 137. Yes, Mr. Henkle.

Is there any difference in regard to the character of these subordinate funds about which you have testified which differentiates them from those to which he testified this morning? A. I don't think so.

X-Q. 138. During this period of time, 1930 to 1933, wasn't the District paying dividends? A. No, sir.

X-Q. 139. It was not? A. No, sir.

X-Q. 140. Did it ever pay a dividend? A. Not to my knowledge.

X-Q. 141. Relative to Petitioner's Exhibit 16, reports which you have testified, I believe, were sent regularly to the Maine Company—do you recall that? A. Yes, sir.

X-Q. 142. Weren't those reports sent also to the New Jersey Company? A. I never sent anything to the New Jersey Company.

X-Q. 143. Well, do you know whether they were sent to the New Jersey Company? A. They were addressed to the Maine Company, not to the New Jersey Company, so far as I know.

X-Q. 144. Do you know that they were addressed to the Maine Company? A. Well, it is a fine point, Mr. Clark. I

can't say what was actually on the envelope, but the intention

X Q. 145. No, no, I quite appreciate that. *A.* But the intention, I believe, was to address them to the officers of the Maine Company.

X Q. 146. Were you responsible for having them so addressed? *A.* No, sir. No, sir.

X Q. 147. You were not? *A.* No.

X Q. 148. Did you send any of those reports to Mr. Prince individually? *A.* No, sir.

X Q. 149. Or to F. H. Prince & Company, Inc.? *A.* No, sir.

X Q. 150. Why was that not so? They were stockholders, weren't they? Well, I should say certificate holders, because it is a trust? *A.* Well, all of my correspondence and all of my requests, even the letters I addressed to Mr. Prince, are addressed care of Mr. J. A. McDonough, at the office.

The Member: Well, are you the one, generally speaking, who is responsible for having these reports sent? *A.* No, sir.

X Q. 151. Who is? *A.* Well, I would say that the orders came from on top and they were actually sent by the accounting department direct.

X Q. 152. Without your supervision? *A.* Yes, sir.

X Q. 153. And so they are the people who would know to whom these reports are sent? *A.* I would think so, Your Honor. I am not sure, though.

Mr. Clark: That is all, I guess.

The Member: Wait just a moment.

The Witness: Excuse me.

The Member: I want to inquire here.

Q. 154. (By the Member). Looking at this balance sheet

here of your books which you have already referred to as being S-34 — A. Yes, sir.

Q. 155. — Mr. Welch has asked you about the item called "Accounts and Notes Receivable." A. Yes, sir.

Q. 156. And you said that they represented the receivables, as I understand it, from the purchasers or lessees of the properties of the company, who, in turn, gave back these notes or in some way amortized the purchase price? A. Yes, sir.

Q. 157. That is what that "Notes Receivable" item means, doesn't it? A. Yes, sir.

Q. 158. Now, does that mean, then, that the real estate which you sold or contracted to sell to the lessee or purchaser, speaking loosely, was taken out of your books so that the asset represented by the real estate was no longer there but was now in the form of these notes receivable? A. I would think that was the way it was done, Your Honor, but I don't know the mechanics of it.

Q. 159. You are not sufficiently familiar with your accounting system to know about that? A. No, sir; but that would be the way I would think it would be done.

Q. 160. Can you tell me, generally speaking, what the item called "Capital Assets," which is represented in the various years by eleven million, and fourteen million, and fifteen million, are? Can you tell in a general way what that is? A. That is everything that belongs to the District including what is left of these purchase contracts, streets, land that is undeveloped, anything that we have that was left that belonged to the District.

Q. 161. Well, now, that would indicate, I should think, that a piece of land would be found at its book value within the item called "Capital Assets," but that after you have contacted with an industry to put a building on the property and let them acquire it; that from that time that prop-

erty would be out of the capital assets account and put instead in the notes receivable account? A. That would be proper accounting for it.

Q. 162. Now, if that is so, how am I to understand your statement that the capital assets account represents to some extent some of these purchase contracts? A. I can't talk authoritatively on it, but I believe that is the fact, but I don't know. I am not familiar with this accounting in here. I don't know.

Q. 163. Well, is it fair to say that the item "Capital Assets," which seems to represent the largest item among your assets, does in fact represent to a very large extent the book value of the lands which are still owned and undisposed of? A. And buildings as well.

Q. 164. Together with buildings? A. Yes, sir; I would think so.

Q. 165. Have you any idea of how that would be? A. I haven't.

Q. 166. How you can divide that as between land and buildings. A. I wouldn't have, Your Honor.

Q. 167. Take a $14,000,000 figure, round figures as it appears at the end of 1930. A. I would have to see the detailed figures. These are just summaries.

The Member: All right. Anything further?

Mr. Welch: Just a moment, Mr. Hackett. I may want to ask you something, but I doubt it.

Mr. Clark: I haven't quite finished yet, Your Honor.

The Member: All right. You said you had and that is the reason I took this up.

Mr. Clark: Yes, I appreciate that.

The Member: All right.

X-Q. 168. (By Mr. Clark). You went out of the District and opened a new district called the Crawford District,

did you not? *A.* We have a management contract for developing that district.

X-Q. 169. When was that entered into? *A.* About '31, I think, or '32.

X-Q. 170. And why was that done? *A.* To give us an opportunity to build up tonnage for the railroad. Under the contract, if you would like to have me explain—under the contract, as we obtain a concern that is desirable, we buy the land from the New York Central and furnish the money for the improvements the same as we do in the Central Manufacturing District that we own and have to build, and the idea of that is to build up the tonnage for the railroad.

X-Q. 171. Where is the Crawford District located, if you can indicate on the map? *A.* The Crawford District is not shown on that map, but I have a smaller map, I think, where I could show it.

X-Q. 172. Well, could you tell me relatively how far it is from there? (The witness leaves the witness stand and indicates on the map:) *A.* This is Forty-seventh Street here (indicating).

X-Q. 173. Yes. *A.* Now, the Crawford District is about —Forty-seventh and Western—it is about a mile—it is about two miles west.

X-Q. 174. In which direction? *A.* West, this way (indicating), on Forty-seventh Street.

X-Q. 175. How large is this Crawford District? *A.* It is about 380 acres. It is about as large as our other districts put together.

The Member: Entirely south of Forty-seventh Street, is it?

The Witness: No, Your Honor, it is entirely north of Forty-seventh Street, and spans what is Crawford Avenue, a due north-and-south highway.

The Member: So that it is west of the southernmost part of the stock yards section?

The Witness: Yes, sir.

The Member: As shown by this map?

The Witness: Yes, sir.

The Member: And about 3 miles west; is that right?

The Witness: Yes, sir.

X-Q. 176. (By Mr. Clark). Now, does the railway serve that district? *A.* Yes, sir.

X-Q. 177. It does. In what way and to what extent? *A.* It is a belt railway, the same that serves this property in here (indicating), these tracks. A car comes in here to this Ashland Avenue yard for an industry over in the Crawford track, and is switched around here and around to the Crawford track. It is all tonnage over the railroad coming in and out.

X-Q. 178. Well, how much trackage is there in the Crawford District? *A.* Well—

X-Q. 179. As compared with— *A.* —oh, it is very small. We have only about five or six industries in the Crawford District.

X-Q. 180. Well, I want to know about the amount of trackage as compared with that here in what we call the District, the C. M. D. *A.* It is very small. We have one, two—two industries over there now. We are putting in two new ones, just started construction about a month ago.

You see, the contract was signed in '31, during the depression, and there hasn't been very much industrial building for the last eight or nine years.

X-Q. 181. Well, how much trackage is there as compared with what you have here? *A.* Do you mean actual tracks, side tracks?

X-Q. 182. Yes, if you can recall. *A.* I would say there would be approximately two miles of side tracks.

X-Q. 183. As compared with what? A. As compared with 166.

The Member: And no main tracks as compared with your 21 miles here?

The Witness: They have no running tracks there, Your Honor. They are just passing tracks, and we call those side tracks.

The Member: Are you through now, Mr. Clark?

Mr. Clark: Not quite yet, Your Honor.

The Member: All right.

Mr. Clark: If you will pardon me.

The Member: It is all right. Take all the time you need.

X-Q. 184. (By Mr. Clark). Now, let me ask you one more question, please. A. Yes, sir.

X-Q. 185. When the District needed money in prior years, that is, prior to '32, '33, didn't it borrow money in the open market? A. I don't think so, Mr. Clark.

X-Q. 186. Well, do you know? A. No, I do not, without refreshing my memory or looking it up; no, sir.

X-Q. 187. You had nothing to do with any such borrowing, then, in any event? A. Not before '30; no, sir.

X-Q. 188. Do you have S-35? A. Yes, sir.

X-Q. 189. Will you look at the balance sheet, please, and will you, refreshing your recollection from that or stating the contents thereof, say whether there isn't evidence of borrowed money? A. Will you state that question again, please?

Mr. Clark: The Reporter. (Question read.)

A. It show here notes payable. I assume that is borrowed money.

X-Q. 190. (By Mr. Clark). Anything else that would be evidence of borrowed money? A. I wouldn't think so. I don't know.

X-Q. 191. (By the Member). Well, you mean you don't

read this balance sheet as indicating borrowed money? A. No, sir.

X-Q. 192. Except in the item of notes payable? A. No, sir.

X-Q. 193. Do you know of any borrowed money other than that? A. No, sir.

X-Q. 194. Irrespective of the balance sheet? A. No, Your Honor.

X-Q. 195. (By Mr. Clark). How much is there under the item "Notes Payable"?

Mr. Welch: In what year, Mr. Clark?

Mr. Clark: I was directing attention to the years '30 to '33. A. Well, notes payable in '30 shows $200—$200,000. I beg your pardon.

X-Q. 196. (By Mr. Clark): I couldn't imagine $200 in this kind of a case.

And '32? A. And '32, $608,000.

X-Q. 197. And '33? A. $1,855,000.

Mr. Clark: That is all.

Mr. Welch: Just a moment, Mr. Hackett.

That is all, Mr. Hackett. (Witness excused.)

Mr. Welch: Mr. Reimers, please.

MR. DAVID H. REIMERS.

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Welch). What is your full name, please, sir? A. David H. Reimers.

Q. 2. Where do you live, Mr. Reimers? A. 93 Indian Hill Road, Winetka, Ill.

Q. 3. And you were sworn just now? A. Yes, sir.

Q. 4. What do you do? A. I am president of the Live Stock National Bank of Chicago.

Q. 5. Is that a bank in the stock yards district in Chicago? *A.* Yes, it is.

Q. 6. Will you tell me, sir, because I don't want to ask you to leave the stand, if I am now pointing to it on Exhibit 3 where there is the legend "Live Stock National Bank," and a line leading into a building? *A.* It is difficult for me to see from here, but the bank is at the main entrance of Union Stock Yards at Forty-seventh and Exchange Avenue.

Q. 7. How long have you been president of the bank? *A.* Since April of 1933.

Q. 8. Was that the date of its formation? *A.* That is right.

The Member: The main entrance is at what street?

The Witness: Halstead and Exchange Avenue.

The Member: Didn't I hear you say something about Forty-seventh Street?

The Witness: I meant to say Halstead.

The Member: Say it over again, where the bank is.

The Witness: The bank is at the main entrance to the Union Stock Yards, at Halstead Street and Exchange Avenue.

Q. 9. (By Mr. Welch). Would you tell us now, Mr. Reimers, how that bank came to be formed? *A.* The Live Stock National Bank is the outgrowth or is a take-over, I should say, of the Stock Yards Bank & Trust Company, which, in turn, had succeeded to the business of the Stock Yards National Bank and Stock Yards Trust & Savings Bank. The Stock Yards Trust & Savings Bank was an affiliate of the Stock Yards National Bank. Both of those banks did business in the same building.

Q. 10. Were they old, or was one of them old? *A.* Both of those banks, Mr. Welch, date back, oh, I think it is in June of 1868.

Q. 11. That bank was a State or national bank? *A.* Which one are you referring to? There was a Stock Yards National Bank.

Q. 12. That was, then, a national bank? *A.* That is right.

Q. 13. Let me see if I get this straight, for the record—and I am quite sure you won't mind my leading myself perhaps, as well as the witness—is it correct to say that prior to January of 1933 there was the Stock Yards Trust & Savings Bank and the Stock Yards National Bank and that their assets were consolidated; is that right? *A.* That is right.

Q. 14. And as their assets were consolidated, became the Stock Yards Bank & Trust Company? *A.* That is right.

Q. 15. Now, did that consolidation result from an examination that you had made? *A.* I had made the last national examination of the Stock Yards National Bank; that is correct.

Q. 16. What were you, then? *A.* I was a national bank examiner.

Q. 17. And you had examined what bank? *A.* The Stock Yards National Bank.

Q. 18. When was that, sir? *A.* In August or September, 1932.

Q. 19. Now taking that date when you made that examination, will you tell us what banks had been serving the stock yards district prior to that examination? *A.* There was the Stock Yards National Bank and, as I have said, its affiliate, the Stock Yards Trust & Savings Bank.

The Central Manufacturing District Bank and the Drovers National Bank.

Q. 20. Were all four of them open when you made that examination in 1932? *A.* They were all open and doing business except the Central Manufacturing District Bank which closed in July, I believe, of 1932.

Q. 21. As a consequence of your examination of the Stock Yards National Bank, did you make certain recommendations concerning it? A. I did.

Q. 22. What were the recommendations that you made? A. I made alternative recommendations, Mr. Welch.

Q. 23. What were they? A. One was along the lines of greatly strengthening the bank and permitting it to continue to do business as a national bank and a member of the Federal Reserve System, or the other was to give up its charter as a member of the Federal Reserve System and as a national bank.

Q. 24. Which alternative was adopted? A. The latter.

Q. 25. That is, it gave up its charter? A. It did.

Q. 26. And ceased to be a member of the Federal Reserve? A. That is right.

Q. 27. What happened when it gave up its federal charter? A. The assets of the Stock Yards National Bank and the Stock Yards Trust & Savings Bank, its affiliate, were merged under a State charter, called the Stock Yards Bank & Trust Company, and that actually took effect on, I think, January 10, 1933.

Q. 28. What part, if any, did the Transit Company play in that reorganization? A. The Transit Company at the time put in a million dollars of Government bonds.

There was some accrued interest bringing that up a little beyond a million dollars, which, in effect, was a contribution because within 3 months it was lost.

Q. 29. That happened when? When was the Transit contribution made? A. On the same day that the State Bank charter became effective.

Q. 30. And that was when? A. January 10, as I recall, 1933.

Q. 31. And then the State bank called the Stock Yards

Bank & Trust Company began to function; is that correct? A. That is correct.

Q. 32. At the time the Transit Company put the million dollars in Government bonds in, was something done about the capital structure of the bank? A. You mean, Mr. Welch, the newly organized bank? The Stock Yards Bank & Trust Company?

Q. 33. Yes. A. Yes, there was.

Q. 34. What was done? A. The old bank had a capital made up of 100,000 shares, the par of each was a hundred dollars a share. That number of shares was reduced to 10,000 shares having a parred-up value of $20 a share. The total number of shares then were increased to 50,000 shares by selling 40,000 shares, and those shares were sold, as I recall it, at $37.50 per share.

Q. 35. Who took the 40,000 shares? A. Those shares, the 40,000 shares, were subscribed and paid for by Western Associates.

Q. 36. A subsidiary of what company? A. Of the Maine Company.

Mr. Welch: That, if Your Honor please, is the Western Associates, Inc., which appears on the family tree, which is Exhibit 1 (indicating).

Q. 37. (By Mr. Welch). Now, after the formation of this new State bank, and after the subscription to stock of one million five, and the million dollars had been put in by the Transit Company, did someone approach you about becoming connected with it? A. Yes, they did.

Q. 38. Who did? A. I received a telephone call from Mr. Traylor, the president of the First National Bank.

Q. 39. You don't need to tell us what he said. And about when was that? A. In the forepart of January, 1933.

Q. 40. And as a consequence of that, did you have a conversation with him? A. Yes, I did.

Q. 41. And, in turn, as a consequence of that conversa-

tion, did you talk to someone else? A. Yes, I talked with Mr. Arthur G. Leonard at his office at the Union Stock Yards.

Also Mr. Howard M. Simms, manager of the Chicago Clearing House Association.

Q. 42. Did you talk with anyone else? A. Yes, as I recall, I talked with Mr. McDonough and Mr. Prince; both.

Q. 43. How did you talk to Mr. Prince; in person or on the telephone? A. On the telephone.

Q. 44. Will you tell us the substance of that conversation with Mr. Prince? A. Mr. Welch, I was a little bit undecided about accepting a position at the bank; and I called him to inquire.

Q. 45. Well, will you tell us the substance? A. I told him I had been approached on the matter of accepting the presidency of the bank and I was hesitating.

Q. 46. What did he say to that? A. I first told him why I was hesitating. I told him I didn't think the set-up was sound and in very few words he told me not to worry about that, that he would be out in a very few days and see me.

Q. 47. Did he come out later? A. Yes, he did.

Q. 48. About how soon? A. In the next few days, possibly a week, ten days.

Q. 49. Did you meet him? A. Yes, I did.

Q. 50. Where? A. I had lunch with him at the Saddle and Sirloin Club in the Union Stock Yards.

Q. 51. Was anyone else present with you? A. Yes, Mr. Leonard was present first, and we chatted a while, and he left us.

Q. 52. Will you tell us the substance of what was said by Mr. Prince and you, on this occasion? A. We visited for a while and he discussed the various properties there in the enterprise, asking if I was familiar wth them, and I told him, "Not to any great extent," and I think he asked

something about my own experience, and so forth, and I told him I didn't think I would be with the bank very well.

He asked me why and I told him again I didn't think the set-up was sound and that he may have been under the impression that the amount of money that his companies had poured in there was sufficient to see his bank in a satisfactory condition, but I didn't think so.

Q. 53. What did he say to that? *A.* He asked me how much, in my opinion, would be necessary to effect a satisfactory condition, and I told him I thought it would take another $5,000,000.

Q. 54. What did Mr. Prince say then? *A.* He said plenty.

Q. 55. I didn't ask you how much he said, but what did he say? *A.* He said, "My God, Reimers, you don't mean that."

I said, "Yes, I do, Mr. Prince." I said, "I have been through the set-up very thoroughly and I think that my figures are correct."

I told him that it was his problem but that I didn't think he could afford to let the bank fail.

I told him or reminded him that his own companies had approximately $4,000,000 on deposit there; that in the event of a failure of the bank that, in my judgment, he couldn't expect to receive more than 25 or perhaps 30 cents on the dollar on the receivership; that he would lose his investment in the bank stock, and, in addition, pay an assessment.

Q. 56. Did you say anything else? *A.* I also told him, which I don't think was necessary—he seemed well aware of the fact in our discussion of it—that the bank in the country and I knew that of my own knowledge because I had examined throughout the Federal Reserve District for approximately four years, that it was regarded as one of the oldest banks in Chicago, which it was, and was generally known throughout the country as a yards bank, not

as a privately owned bank; that it was just a part of the stock yards; that there were a great many, I think there was something like 400,500 bank accounts carried in the Stock Yards National Bank. That was exclusive, entirely, of the number of remittances, collections that were made through the bank that went to all parts of the country, and if the word should go out that this bank had failed, that it would have a tremendous effect without any question upon shipments into the yards.

Moreover, there were something over 65, 70, perhaps 75 commission firms that banked in that bank, and that those people, in fairness to their customers, would have to tell them the news, and, of course, shipments would immediately cease; possibly not in their entirety, but certainly it would have a damaging effect.

He agreed with me on that.

He told me that perhaps I was right but that he didn't want to do anything about it right then and asked me to go along and keep in close touch with it and keep him informed and to keep in touch with Mr. McDonough if anything out of the ordinary came up.

Q. 57. What did you say? *A.* I told him I would do that.

Q. 58. In your conversation with Mr. Prince, as you told it, you said something about this bank having 400 bank accounts. Did you mean it had 400 accounts on its books or 400 accounts with country banks? *A.* I mean by that, Mr. Welch, that there were approximately that number of banks in the country where live stock is produced that carried accounts with our bank.

Q. 59. Well, after this conversation and your promise to go along and keep him advised, what happened next, Mr. Reimers? *A.* Well, I again began a complete re-examination of the assets of the bank with a view towards determining whether or not I had been too pessimistic in my first

appraisal of it, and that required probably two and a half or three weeks.

That examination was conducted by myself and the officers of the bank under my direction.

Q. 60. And toward the end of that or after it was done, did some other event of some importance take place? *A.* During this time, and from there on, we were losing accounts. Our cash reserves were going down and I informed the directors of the bank unless something were done that, in my opinion, the bank would have to suspend business.

We went along like that until the national bank moratorium which I believe was the forepart of March in 1933.

Q. 61. I suppose that closed this bank, with all the others in the country? *A.* Our bank closed with the others; that is right.

Q. 62. Did you make an application to reopen? *A.* Yes, I did.

Q. 63. What happened to your application? *A.* It was turned down.

Q. 64. When was that? About when? *A.* Well, it was, if you will recall, there were a few of the banks that were licensed almost immediately, a day or so following the moratorium; and it was following that day or two—well, it was at the same time that I applied to reopen, and our application was refused.

The Member: We will suspend and take just a few minutes' recess. (There was a short recess taken.)

Q. 65. (By Mr. Welch). Before the recess, Mr. Reimers, you told us, I think, that your application to reopen had been turned down. *A.* That is right.

Q. 66. Or was turned down? *A.* That is right.

Q. 67. As a consequence of that, did you then again see Mr. Prince? *A.* Yes, I did.

Q. 68. Where? *A.* In New York.

Q. 69. And when with reference to the time that your application to reopen was refused? A. I believe the following day.

Q. 70. About when in the month was that, if you recall? A. Well, as I recall, the moratorium was very shortly after March 4th, and I think that was the first bank's license to be reopened after the moratorium, or about three or four days, if I recall correctly, following the moratorium, and it was during that three or four days that I applied to reopen, so I imagine it would be about March 8th, 9th, 10th, somewhere in there.

Q. 71. At whose suggestion did you go to New York? A. Mr. Prince.

Q. 72. How did you go? A. I flew to New York that night.

Q. 73. Did you have a further conversation with him? A. Yes, I did.

Q. 74. When you arrived in New York? A. Yes, I did.

Q. 75. Who was present? A. Mr. O. T. Henkle.

Q. 76. Will you tell us the substance of what was said by you and what was said by Mr. Prince on that occasion? A. I told Mr. Prince that the banking authorities had refused us permission to reopen the following—following the national moratorium without a substantial correction being made in the condition of the bank, and he asked me if I meant by a substantial correction substantially the amount that I had indicated to him in Chicago, and I told him that I did.

Q. 77. What did he say then? A. This is just what he said: "Why don't we close the damned bank and go over to the Exchange Building and start a new one? You come along with me and run it."

Q. 78. What did you say to that? A. I said, "Definitely no," and told him why.

Q. 79. What did you tell him? A. I told him that the

damage then would have been done in so far as the yards were concerned, that if this bank closed, the yards would have a black eye as far as its bank is concerned. I saw no future for it, and told him so; that in addition to that he could expect to receive, as I had previously indicated to him, not to exceed 30 cents on the dollar on his deposits, his company deposits; that he would lose his investment in the bank stock and could be assured of paying 100 percent assessment. He told me that I was probably right.

Q. 80. May I interrupt you to ask you: Had you said anything about cash or the need for cash? *A.* I had indicated to him every time I had talked to him that cash was a necessity and an immediate necessity regardless of what happened in the way of an asset correction.

Q. 81. Then when you told him of the need for cash and in these amounts, what did he then say to you? *A.* He talked about different ways of getting the money and asked me, knowing that I at one time had been connected with the office of the Reconstruction Finance Corporation, if there wasn't some way there that they could get the money there.

Q. 82. May I interrupt to ask you if he said anything about the Maine Company having cash? *A.* Well, I might say this, Mr. Welch. I neglected to say to you that during our discussion at Chicago, at the Club, that time that I referred to a few moments ago, that I was particularly interested, and naturally so, in just what the so-called set-up was, and Mr. Prince told me about the various companies and working arrangements of them and what his plans were.

He asked me if I was familiar in any way with the different companies. I told him I was not, and I was not at that time. He explained to me the names of the different companies, what his plans were, and what he was striving

to do. And I recall particularly that he drew attention to his plan to accumulate cash sufficient to retire debts of the companies in 1940, and that in whatever plan I might work, to please try and avoid calling upon that fund, if I could. And that same conversation was repeated in New York.

And following that he suggested that I go to the R.F.C. I told him that I didn't think there was any chance of getting money there. He asked me to go anyhow and try, and he told me that he would send Mr. McDonough with me to help me, and we did go back to Chicago. Mr. McDonough came on, I think, the following day or a day or two later, and we spent several days in the Federal Reserve Bank with the Reconstruction Finance officers, and knowing some of the examiners there, I got immediate attention to the class of assets that we wanted to consider first. That required probably a week or ten days.

We were asked to return and the answer was no. We were refused any loan.

Q. 83. So nothing came of the R. F. C. talk? *A.* Nothing whatever.

Q. 84. Well, then, what happened next? *A.* Well, with my own men, I assisted the R. F. C. examiner in going over the assets, and after they had returned to their office without giving us a definite answer, I continued on with compiling all of the facts, classifying the assets. That required possibly two weeks, maybe a little more.

In the meantime, I was in touch with Mr. Prince and Mr. McDonough on the telephone I think every day, two or three times a day.

While or during that two or three weeks, the examiners walked in one morning, came to my office, and told me that they were there to take charge of the bank.

The Member: What examiners?

The Witness: The State examiners.

The Member: You have been talking about the R.F.C. examiners up to now, haven't you?

The Witness: I was, on the matter of getting the loan, Your Honor.

The Member: That is the first we have heard about the State examiners?

The Witness: That is right.

The Member: Yes.

Q. 85. (By Mr. Welch). And did they say something about the length of time that your might keep open? *A.* Well, the head examiner told me that he was there to take charge of the bank, and I think he had a crew of seven or eight men with him, and I asked him if he wouldn't give me some time in which to get in touch with Mr. Prince and see what I could do. We agreed that he would give me 48 hours.

Q. 86. And what did you then do? *A.* Before any action was taken, Sir?

Q. 87. What did you then do? *A.* I immediately got on the telephone with Mr. Prince.

Q. 88. Will you tell us the substance of what was said by you and by him? *A.* I told Mr. Prince that the examiners were there in the bank and had given me 48 hours to decide what we were going to do with it.

Q. 89. What did he say? *A.* Well, Mr. Prince started to talk about various ways and methods of correcting the thing, going along, dwelt at length on returning to the R.F.C. to see what we could do there, and I finally told him, possibly a little out of patience, that I had called him on the telephone and if he didn't mind I would do the talking. We had been closed then for perhaps three weeks and I thought it was time that we were doing something. As a matter of fact, I had been given an ultimatum of 48 hours. We had to do something.

And I told Mr. Prince there was nothing that he could do

other than what I had previously advised him, and I indicated to him a plan of subordinating four million dollars of the company accounts, and that if he would do that that I thought I could get the bank open as a national bank, as a member of the Federal Reserve, and as a member of the Chicago Clearing House Association, and do it within a week.

Q. 90. What did he say to that? *A.* He asked me what would happen or what he would get on his deposits under such an arrangement, and I told him that I thought that he would recover approximately 50 and perhaps 60 cents on the dollar of the amounts he subordinated.

Q. 91. And what did he say then? *A.* I told him that if he did that, I would stay with him and work it out, and his answer was immediate to go ahead on that basis.

Q. 92. Did you go ahead? *A.* Yes, we did.

Q. 93. What did you do? *A.* We applied for a national charter on the basis—

The Member: This is still within the 48 hours that you—

The Witness: No, Your Honor. When I received the word I turned to the State examiners and told them that Mr. Prince had consented to this arrangement.

Then through an arrangement with the Commissioner of Banks of Illinois, whom I knew, I asked him to leave one of his examiners in the bank while I negotiated what I am about to speak of now.

Q. 94. (By Mr. Welch). Then go ahead and tell us what the negotiations were. *A.* We applied for a national charter on the basis of subordinating this four millions of company accounts.

Q. 95. Can you split that up for us as to what company and to what extent? *A.* Yes, I can.

The Maine Company, $1,800,000;

Transit Company, $1,300,000;

Produce Terminal Corporation, $300,000;

Central Manufacturing District, $600,000. Total, $4,000,000.

These deposits were subordinated under the following arrangement: The companies which subordinated were to be paid only out of certain inadmissible assets equal to the amount of the subordinated accounts.

Q. 96. And when you say "equal to the amount of the subordinated accounts," on what basis? On the book value of the assets in the bank? *A.* That is right. And those funds, or so-called unacceptable assets of the old State bank were segregated into a separate fund to be liquidated by the new bank. Incidentally, the new bank for which we applied for a national charter was in the name of the Live Stock National Bank of Chicago.

Q. 97. And that is the bank that is there today? *A.* That is right. Under this arrangement, as these assets that were removed from the old State bank were to be liquidated and the bank reserved the right—that is, the new bank, the Live Stock National Bank—reserved the right to put into this fund of unacceptable assets any other of its assets which it chose at their book value and received cash for them, and that the companies which subordinated their deposits were to be paid out of this fund only when the new bank agreed and the national bank examiners approved.

Mr. Welch: I should like at this time to offer five subrogation agreements which are the legal spelling out of what the witness has testified to in substance, and if there is no objection to them to substitute photostats for these original contracts later.

Mr. Clark: There won't be any objection to substituting photostats.

Are you familiar with these, Mr. King?

Mr. King: To some extent, yes.

Mr. Clark: Well, just check them.

The Member: Mr. Witness, you have gotten beyond your 48 hours, haven't you?

The Witness: Sir?

The Member: I say, in your testimony you have gone beyond the end of your 48 hours, but you didn't tell us what happened within the 48 hours. They gave you an ultimatum that you had 48 hours delay on, and then I don't know what happened within the 48 hours. Did they withhold action or did that get into—

The Witness: That is a customary thing as between State departments and the national departments, where the word is given that the proper correction is to be made, the State examiner stays in charge technically until the new arrangement is worked out.

The Member: Within the 48 hours that you were given, did you actually apply for your national bank charter?

The Witness: Absolutely; yes, sir.

The Member: So that that much happened within the 48 hours?

The Witness: Yes, sir.

The Member: And the State examiners had that much of an assurance of your intention to comply with their demands; is that right?

The Witness: I think within six hours, Your Honor.

The Member: I am interested to know how much of all this that you have recited happened within the 48 hours and how much went beyond that?

The Witness: That application for a new bank was made, I think, on the same day that I talked with Mr. Prince and got his word to go ahead.

The Member: What about the subordination, the details of the subordination arrangement? Had they been made before the 48 hours?

The Witness: We began work on those immediately, the same day.

The Member: Well, had they been worked out before the end of the 48 hours?

The Witness: Yes, sir; I had that all set. I knew we either had to do that or stay closed.

Mr. Clark: I have no objection to the introduction of these in evidence.

Mr. Welch: You have already been good enough to state that we can substitute photostats.

Mr. Clark: Oh, yes.

Mr. Welch: Then I offer as exhibit—

The Clerk: Seventeen.

Mr. Welch: A contract dated the 5th day of April, 1933, between Chicago Stock Yards Company of Maine and the Live Stock National Bank.

The next one is an agreement between Union Stock Yards and Transit Company and Live Stock National Bank, which will be Exhibit No.—

The Clerk: Eighteen.

Mr. Welch: Thank you, Mr. Ray.

The next one, between Produce Terminal Corporation and the Live Stock National Bank, the number being, Mr. Ray?

The Clerk: Nineteen.

Mr. Welch: And the next one, an agreement between Leonard, Prince, and McDonough, trustees of the Central Manufacturing District, and the Live Stock National Bank, being number—

The Clerk: Twenty.

Mr. Welch: And the next one, a second agreement between Union Stock Yards and Transit Company and Live Stock National Bank also dated April 5, 1933—

The Clerk: No. 21.

(The documents so offered and received in evidence were thereupon marked "Petitioner's Exhibits 17, 18, 19, 20, and 21," and made a part of this record.)

Q. 98. (By Mr. Welch). Without going through the contracts to dig it out, Mr. Reimers, was there some provision in them in respect to different levels at which the Maine Company deposits were to be subordinated and those of the other companies? A. Yes, the Maine Company was given a preference.

Q. 99. Above what? A. All others.

Q. 100. On whose insistence, if anyone's? A. Mr. Prince.

Q. 101. And by the words "all others," do you mean all the other companies in this enterprise, the Chicago Stock Yards enterprise? A. That is right.

Q. 102. Now, I take it, it is clear from your conversation with His Honor that you succeeded in getting your new charter? A. Yes, we did.

Q. 103. When did you actually get it, if you remember? A. I think on April 6, 1933.

Q. 104. Who became the stockholders of this new bank that then emerged and which is there today? A. The stockholders of the Stock Yards Bank & Trust Company, the State Bank, exchanged their stock for stock of the Live Stock National Bank of Chicago, share for share.

Q. 105. We have mentioned from time to time here a bank called the Central Manufacturing District Bank. A. Yes.

Q. 106. You will remember that we have done so. A. Yes, sir.

Q. 107. Have you had anything to do with transactions between the Maine Company and Produce Terminal with this Central Manufacturing District Bank? A. Yes, I have.

Q. 108. What have you had to do with those transactions? A. Well, there were certain real estate bonds, I should say defaulted real estate bonds. I think most of them were, at

that time; that had been purchased by the Produce Terminal totaling a little less than, I think, forty-nine thousand some odd dollars—(referring to documents)—$490,500.

Those bonds had been purchased in 1931 by the Produce Terminal Corporation from the Central Manufacturing District Bank.

Q. 109. Yes.

Had one of the other companies in the enterprise purchased another block? *A.* The Maine Company had purchased notes and claims including accrued interest of $501,439.58.

Q. 110. And what have you had to do with the securities representing those two purchases? *A.* I have actually had those under my charge for liquidation.

Q. 111. Now, Mr. Reimers, I wish you would summarize for us, if you will, using any data that you need, the extent of the participation of the Maine Company, the Transit Company, the Produce Terminal Corporation, and Central Manufacturing District in coming to the assistance of these banks in Chicago, and do it for us year by year, if you will, sir. *A.* Well, in 1930 the Transit Company paid $464,000 for capital stock—

Mr. Clark: Just a moment, please.

May I ask what the question and answer was?

The Member: Will you read it, Mr. Reporter? (Last question and partial answer read.)

Mr. Clark: I don't believe the witness has sufficient knowledge to testify as to that, Your Honor. I think he should be qualified further, at least.

The Member: Do you mean by reason of the characterization of these banks in Chicago that it leaves it too far open to cover anything—

Mr. Clark: I mean I don't think he has knowledge relative to these companies and also as to banks in Chicago.

The Member: I think if the question can be reframed or altered so as to be limited to the Live Stock National Bank and its predecessors, first, and then, if necessary, a succeeding question limited to the Central Manufacturing District Bank, we can take the witness' previous qualifications to speak on that subject, if that is all that is meant.

Mr. Welch: I think the question was somewhat loosely drawn, the phrase "The banks in Chicago."

Q. 112. (By Mr. Welch). Mr. Reimers, will you please summarize for us the extent of the participation of the Maine Company, the Transit Company, the Produce Terminal Corporation, and Central Manufacturing District in aiding the capital structure of the Live Stock National Bank and its predecessors, including in your answer such aid as was given to the Central Manufacturing District in the years 1932 through 1933.

The Member: Can you answer that question?

The Witness: Your Honor, if I might say something, I have checked with the receiver of the Central Manufacturing District on these figures—I mean the Central Manufacturing District Bank—on these figures.

Mr. Clark: That doesn't mean a thing, Your Honor.

Mr. Welch: If I may say a word, he testified, Mr. Clark, he has been in charge of the liquidation of those slow assets that came out of the Central Manufacturing District Bank.

Mr. Clark: That is true, but what he may have checked doesn't seem to me to have any bearing.

The Member: I think this is all precipitated by the unnecessary combination in the question of the two banks. If the question can be segregated so as to refer in the first instance only to the Live Stock National Bank, and its predecessors, we can dispose of that upon the qualifications

that the witness has expressed and then we can take up whether or not he can speak with regard to the Central Manufacturing District Bank.

Mr. Clark: That is what I meant.

Mr. Welch: Thank you kindly, sir.

Q. 113. (By Mr. Welch). Confine yourself first to the Live Stock National Bank and its predecessors and take it year by year from 1930 to 1933 and tell us the extent of the participation of the Maine Company, the Transit Company, the Produce Terminal Company, and the Central Manufacturing District in contributing to the capital structure of the Live Stock National Bank and its predecessors? A. In 1930 the Transit Company paid $464,000 for capital stock in the Stock Yards National Bank.

In that same year the Transit Company purchased from the Stock Yards Trust & Savings Bank real estate bonds having a face value of $100,000 and paid that amount for them.

In 1932 the Produce Terminal Corporation subscribed to and purchased $350,000 of debentures of the Stock Yards Investment Company and paid $350,000 for these debentures.

That investment company, incidentally, was a security affiliate of the Stock Yards National Bank.

In 1933 the Maine Company subscribed $1,500,000 to the capital of the Stock Yards Bank & Trust Company through Western Associates, Inc., and the Transit Company put up $1,016,414.84 of Government bonds, including interest. That was in connection with an attempt to help the Stock Yards Bank and Trust Company.

In that same year $4,000,000 was subordinated at the time of the organization of the Live Stock National Bank in amounts as follows:

Produce Terminal Corporation, $300,000;

Central Manufacturing District, $600,000;
The Transit Company, $1,300,000;
The Maine Company, $1,800,000.

Q. 114. Now let me interrupt to ask you whether or not the Transit Company in 1932 subscribed to and purchased debentures of Stock Yards Investment Company as did Produce Terminal, and, if so, to what extent? *A.* Are you speaking of the Transit Company? Is that the question?

Q. 115. That is right. In 1932. *A.* In 1932 the Transit Company put in $1,340,000 in the same way; purchased debentures.

Q. 116. Now, to turn to the Central Manufacturing District Bank: Do you know of your own knowledge whether the Produce Terminal Company purchased some real estate bonds from the Central Manufacturing District Bank in 1931? *A.* Yes, I do.

Q. 117. And do you know of your own knowledge whether or not the Maine Company purchased some such bonds from the Central Manufacturing District Bank in 1931? *A.* They purchased no bonds, Mr. Welch; they purchased notes.

Q. 118. Notes of what? *A.* Individuals, corporations; largely individuals.

Q. 119. And what was the amount of the purchase of real estate bonds in 1931 by Produce Terminal Corporation from Central Manufacturing District Bank? *A.* $490,500.

Q. 120. And the Maine Company's purchase of notes of individuals and corporations in that same year? *A.* Was $501,439.58.

Q. 121. Were those purchases made on the basis of book value? *A.* Yes, sir.

Q. 122. Did something happen about a purchase of the bank building of Central Manufacturing District Bank? *A.* Yes.

Q. 123. Who bought that? *A.* The Central Manufactur-

ing District Bank was purchased by, I think it was the Maine Company that got that, for $250,000.

Q. 124. May I check whatever you are working from and see if I— *A.* (After referring to documents) No, the Central Manufacturing District.

Q. 125. Did what? *A.* Bought that bank building.

Q. 126. For what amount? *A.* For $250,000.

Q. 127. In what year was that? *A.* That was in 1932.

Q. 128. Now will you summarize what you have just testified to us, year by year, lumping all companies together so that we get the total amount of all companies put into the Live Stock National Bank and its predecessors and Central Manufacturing District Bank, beginning with 1930. *A.* You mean take them year by year?

Q. 129. Yes. *A.* Well, the total amount for 1930 was $564,000.

Q. 130. The next year. *A.* For 1931, $990,500.

Q. 131. The next year. *A.* For 1932, $1,940,000.

Q. 132. For 133. *A.* And for 1933, $6,516,414.84.

Q. 133. Making a grand total for all companies for all years of what? *A.* Making a grand total of $10,010,914.84.

Q. 134. Mr. Reimers, did you, let us say as of December, 1933, have an opinion as to the probable recovery these companies as a unit would realize from their participation in these banks about which you have testified? *A.* Yes, I have.

Q. 135. What was your opinion? *A.* Well, Mr. Welch, I figured it about this way: Of the approximate $10,000,000 that had gone into the bank picture, a million and a half of it went into the structure of the Live Stock National Bank and I figured that the stock of that bank was reasonably worth that amount.

Of the balance of 8½ million or approximately that amount, I estimated, after a very careful appraisal of all of those assets, that there would be a possible eventual recovery of not to exceed 2½ million.

Q. 136. So that the total recovery, in your opinion, counting the stock in the Live Stock National Bank as good, would be what? *A.* Two and a half and one and a half is $4,000,000.

Q. 137. May I ask you to what extent your opinion has been justified by experience? *A.* Well, so far, Mr. Welch, we have sent East out of that whole picture $1,022,728.73.

That includes the following items, if you want them. Do you want them separate?

Q. 138. I don't know that it is necessary to do so. What does it look like now? Will you exceed or fail to reach your 1933 estimate, or what would you say? *A.* I have no reason to change my original estimate. I think we will come very close to that mark.

It will be slow, however, because the remaining assets are principally real estate.

Mr. Welch: You may inquire.

Cross-Examination.

X-Q. 139. (By Mr. Clark). Mr. Reimers, you have testified relative to an amount of approximately $10,000,000 which was put in for bank assistance. *A.* Yes, sir.

X-Q. 140. Now, of what was that comprised? I mean, what was the composition of that $10,000,000? *A.* I am sorry; I don't understand your question.

X-Q. 141. Well, was it securities, was it cash? *A.* That went in to make up the $10,000,000?

X-Q. 142. Yes. A. It was cash.

X-Q. 143. It was cash? A. Yes, sir; every cent of it.

X-Q. 144. No securities, whatever, involved? A. Not a one; no, sir.

X-Q. 145. No bonds? A. It was all hard cash.

X-Q. 146. Let me be certain that I am clear on this point. Hadn't you previously testified that there were some Government bonds that went in in this regard? A. Yes, on or about January 10, 1933, the Transit Company put a million dollars of Government bonds, Treasury notes, to be

X-Q. 147. Then why do you say it was all hard cash? A. Because they were sold the same day and the cash realized

X-Q. 148. I know but that is not quite the same thing, is it? A. Well, I think there was a difference of—the difference was getting them to the Federal Reserve Bank and getting the cash on them.

X-Q. 149. I see.

Wasn't there any stock involved in this? Weren't there some purchases of stock? A. You mean that the bank took stock?

X-Q. 150. No, the companies. A. I don't believe I understand your question there. Are you asking me if what the bank received or the banks received—did they receive any stocks or bonds, or are you asking me—I don't—

X-Q. 151. Well, Central Manufacturing District purchased some stock at the bank, didn't it? A. The Central Manufacturing District?

X-Q. 152. Yes. A. Purchased stock at the bank?

X-Q. 153. Stock at the bank. Wasn't that included? A. I think there was—let me check (referring to documents).

Mr. Clark. I don't recall of any item that I have referred

of the Central Manufacturing District purchasing any stock.

X-Q. 154. How about the other companies? A. Purchasing bank stock? Yes, there is reference made on the first item in 1930, the Transit Company bought capital stock of the Stock Yards National Bank, $464,000 and paid the cash for them.

X-Q. 155. How do you classify that? Would you classify it as an investment? A. You mean on the part of the purchaser, the Transit Company?

X-Q. 156. Yes. A. I should say it were.

Mr. Clark: I have no further questions.

Mr. Welch: Nothing further from me, Mr. Reimers. (Witness excused.)

Mr. Welch: If Your Honor please, I was asking Mr. McDonough, who is our next witness, how he is feeling. He hasn't felt so well, today, and I was somewhat hesitant about starting unless Your Honor is insistent.

The Member: He is going to be here for some time; that is, he will be on the stand for some little time?

Mr. Welch: Yes, I assume he will be on the stand for some little time.

The Member: Very well. We will suspend now until 10 o'clock tomorrow morning. (Whereupon, at 4:25 o'clock p. m., January 31, 1939, the hearing in the above-entitled matter was adjourned.)

[Title omitted.]

THIRD DAY.

REPORTER'S MINUTES.

[Filed February 2, 1939.]

Hearing at Washington, D. C., on the 1st day of February, 1939, at 10 o'clock a. m.

The hearing in the above-entitled proceeding was resumed on this the 1st day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

Mr. Pierson: Mr. Clark is here. I think we can start with the witness. He just stepped out. He will be right back.

The Member: Very well.

Mr. Welch: Mr. McDonough.

MR. JAMES A. McDONOUGH

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Welch). What is your full name, sir? A. James A. McDonough.

Q. 2. Where do you live, Mr. McDonough? A. 50 Beacon Street, Chestnut Hill, Newton, Mass.

Q. 3. What do you do, sir? A. I am the vice-president of the Chicago Stock Yards Company, the Maine Company.

Q. 4. That is what we call the Maine Company? *A.* Yes, sir.

Q. 5. Are you also on its board of directors? *A.* I am a member of the board of directors; yes, sir.

Q. 6. Are you an executive officer of that company? *A.* I am the executive officer of that company under Mr. Prince, the president.

Q. 7. How long have you been vice-president of the Maine Company? *A.* Since March, 1934.

Q. 8. Prior to that time what position did you hold? *A.* I was assistant to the president, Mr. Prince, of the Maine Company.

Q. 9. It follows, I suppose, that you are on the Maine Company pay roll? *A.* Yes, sir.

Q. 10. Are you a director in any of the operating companies in Chicago? *A.* I am.

Q. 11. In what ones? *A.* The Union Stock Yards and Transit Company, Chicago Junction Railway Company, Chicago Junction Railroad Company. I am also director of the bank. I am vice-president of the three companies I mentioned and trustee of the Central Manufacturing District.

Q. 12. Are you on the pay roll of any of the operating companies in Chicago? *A.* I am not, sir.

Q. 13. Now, to go back to the period of 1930 to '33, when I think your title was that of assistant to Mr. Prince— *A.* Yes, sir.

Q. 14. —will you tell us what your duties were then? *A.* Under Mr. Prince's direction while he was in this country, and while he was away, personally, I was continually on the telephone while I was in the East conferring with the operating men in Chicago, and directed the business policies of the company, the selection of officers and directors, bank deposits, general matters of policy other than the actual routine operating of those companies.

Q. 15. Would it be fair to say that you were the chief executive officer of the Maine Company in Mr. Prince's absence? *A.* Yes, sir.

Q. 16. And when Mr. Prince was available? *A.* I consulted him first, and after the result of the conferences, our orders were passed on to Chicago and were carried out at once.

Q. 17. How was your time divided between the West and the East? *A.* I made two—I made at least two trips a month to Chicago, and if the occasion warranted it, I made more; and during the bank crisis, I was out there for several months.

Q. 18. Mr. Green points out to me that you said something about directing the policies of "those companies." By "those companies," did you mean the operating companies? *A.* I meant the operating companies.

Q. 19. In Chicago? *A.* In Chicago; yes, sir.

Q. 20. Taking the years 1930 to 1933, did you receive any reports of the operations of the units in Chicago? *A.* I did.

Q. 21. And by "units," I mean, of course, the Chicago companies. *A.* The Transit Company, the Railway Company, the Produce Terminal Corporation, and the Central Manufacturing District.

Q. 22. When you received those reports, what did you do with them? *A.* I examined them and discussed them with Mr. Prince.

Q. 23. And as a result of that examination, or that discussion, would anything happen from time to time? *A.* Yes. The suggestions and orders would be given to the operating men in Chicago telling them what the Maine Company wanted them to do.

Q. 24. Now, will you tell us in a general way what sort of orders would go out from you to the Chicago companies?

A. Well, if there were any changes in officers or directors, the manner in which bank deposits were handled, and what bank the moneys were to be placed, if there were any large sums requested for additions or improvements, or if the District wanted money to buy real estate or put through a big real estate deal, any matter that called for large amounts of money that was out of the ordinary daily business, we would discuss and pass on them.

Q. 25. And after you had passed on them? *A.* Those orders from the Maine Company would be carried out at once, on the spot.

Q. 26. I think you have already mentioned the banking crisis in Chicago, as I call it. *A.* Yes.

Mr. Welch: Strike that out, will you? I don't think it is fair to characterize it.

Q. 27. (By Mr. Welch). You have already mentioned some transactions relating to the Chicago banks. *A.* Yes, sir.

Q. 28. I think you said you were out there at that time? *A.* Yes, sir.

Q. 29. What, if anything, did the Maine Company do about the way that whole matter was handled? *A.* The Maine Company handled and controlled the entire transaction from beginning to end. It controlled it by passing orders down to Mr. Reimers and to Mr. Leonard and Mr. Hackett. As far as Mr. Hackett was concerned, they were carried out forthwith.

The Member: You are talking now about the situation in the early part of 1933?

The Witness: Yes, sir; at the time the bank was reorganized; yes, sir.

Q. 30. (By Mr. Welch). Who decided what accounts were to be subordinated? *A.* The Maine Company, through Mr.

Prince and myself; principally through me because I was on the spot.

Q. 31. And the amounts and the ranking of the subordination? *A.* Yes, sir; the amounts and the ranking and how they were placed; yes, sir.

Q. 32. When did you first become assistant to Mr. Prince, the president of the Maine Company? *A.* About 1926.

Q. 33. Was that shortly after the death of Mr. Sporr? *A.* About the time of the illness, at the end of Mr. Sporr's illness, and right at his death; yes, sir.

Q. 34. And we have already testified about Mr. Sporr, but I will ask you who he was? *A.* Mr. Sporr had been in complete charge of the affairs in Chicago of the operating companies, and he carried on by himself without any material control from the East.

Q. 35. Had you been associated with Mr. Frederick H. Prince before 1926? *A.* Oh, yes, sir; for many, many years.

Q. 36. In what capacity? *A.* Oh, I began as a stenographer and general office assistant, and as time went on, I became his confidential secretary.

Q. 37. What was it that happened about 1926 that resulted in your becoming his assistant? *A.* Mr. Prince became actively engaged in the handling of the affairs in Chicago as president of the Maine Company.

Q. 38. And what occasioned his becoming so? *A.* At the death of Mr. Sporr.

Q. 39. Yes. *A.* And as a result of that, he took me into the Maine Company as his assistant.

Q. 40. When you became Mr. Prince's assistant, what was the first thing that you did to equip yourself for your new job, Mr. McDonough? *A.* Well, I made a study of the situation of the relationship of the various companies to the Maine Company, and tried to get a general picture of the whole thing.

Q. 41. As a consequence of the study that you made, did you produce anything in writing? A. I did.

Q. 42. What did you produce? A. Knowing Mr. Prince's well, I produced a condensed concise cash statement of receipts and expenditures.

Q. 43. Had that, to your knowledge, ever been done before? A. No, sir.

Q. 44. How condensed was it? A. Two pages.

Q. 45. What was your reason, Mr. McDonough, for condensing it so closely? A. Because Mr. Prince has always expected and insisted on receiving a statement as near to one page as was possible to put down. He wanted it as concise as we could make it.

Q. 46. I show you a paper and I ask you if this is a copy of that first condensed statement that you have testified to making? A. Yes, sir. (Paperwritings were handed to Mr. Clark by Mr. Welch.)

Mr. Clark: You want to offer this in evidence?

Mr. Welch: I do.

Mr. Clark: I would like to have it understood, Your Honor, that this is offered only as something which Mr. McDonough turned over to Mr. Prince, because we have balance sheets in evidence which elaborate—

The Member: The record shows what is it. The record shows how it happened to be made.

Mr. Clark: I just wanted—

The Member: There is nothing that Counsel can say that will add anything to that.

Mr. Clark: I just wanted to have it clearly in the record.

The Member: You are offering it, Mr. Welch?

Mr. Welch: Yes, if I may.

The Member: You have no objection to it?

Mr. Clark: No objection.

The Member: Received. What is the number?

The Clerk: Petitioner's Exhibit No. 22.

(The document so offered and received in evidence, was marked "Petitioner's Exhibit 22," and made a part of this record.)

The Member: Is that merely loosely clipped together? There are two pages of it, are there?

Mr. Welch: Yes.

The Member: I wanted the record to show exactly how much of it there is.

Mr. Welch: The record shows, then, that there are two pages of it loosely clipped together.

The Member: All right.

Mr. Welch: And I undertake to see that it is attached in better fashion.

The Member: It will stay together. I simply wanted to be sure that anything else doesn't get under that clip that is part of it.

Q. 47. (By Mr. Welch). When you got the statement prepared, Mr. McDonough, of which Exhibit 22 is a copy, what did you do with it? A. I handed it to Mr. Prince, the president of the Maine Company.

Q. 48. As a consequence of that, did you have any conversation with him in respect to it? A. I did.

Q. 49. Will you tell us the substance of what was said by him at that time? A. In my own words, or—

Q. 50. Oh, yes. A. "Mr. McDonough," he said, "I am delighted that you arrived at this form of report, and I hope that you will keep it constantly before you and keep it up to date, as nearly as you can, because I want to accumulate all of the cash that I can, between now and 1940 to meet a very large obligation that is ahead of me, and I want to know what my cash position is from day to day, if possible, and I want you to keep me so advised."

Q. 51. Did he say anything about what the obligation ahead of him was, Mr. McDonough? A. He did.

Q. 52. What did he say it was? A. He said that the New Jersey Company's charter was expiring in 1940, and that he wanted to be in a position to meet those obligations when they became due.

Q. 53. Did he say anything else at that time, Mr. McDonough—refreshing your recollection, did he say anything about you going to Chicago? A. Yes, he told me that he wanted me to be familiar with the operations, because of the extra duties that were falling upon him in the Maine Company, because of taking over the active control of the properties in Chicago. He wanted me to go out there to the live stock show, become familiar with its purpose, to take and familiarize myself with all of the properties, and with their workings, and to come to know who the people were who were in them, and to meet the people who were out there, to do business with them.

Q. 54. Did he say anything else, Mr. McDonough,—refreshing your recollection, did he say anything about you being his eyes and— A. Oh, well, he would say that from time to time, that I was to be his eyes, his ears, and that I was to just represent him—be him, while he was not on the field.

Q. 55. After that, from time to time, did you prepare statements for Mr. Prince in the form of Exhibit 22? A. Yes, sir.

Q. 56. How often? A. Well, we—annually—usually semi-annually but always annually in that form, but we gave him weekly, monthly, quarterly, or whenever he wanted it, statements of the cash position of those companies, as he asked for them, but we kept him informed at least weekly as to what the situation was.

Q. 57. Was Mr. Prince occasionally out of the country? A. Yes, sir.

Q. 58. In the event that he was out of the country, what, if anything, was done about furnishing him information? A. He got those by letter, or by—in the mail—and if anything very important came up, why, he was communicated with by cable.

Mr. Welch: Excuse me a moment.

Q. 59. (By Mr. Welch). Taking the years 1930 to 1933, how did your activities in Chicago compare with the earlier years about which you are now talking, in 1925, say? A. Welk, they increased, and as the time went on.

Q. 60. What would you say was the extent of your activities in managing the operating companies in the years in question, here, 1930 to 1933? A. Well, in constant touch with them.

Q. 61. Were you doing anything else? A. Yes.

Q. 62. How much else?

I mean by that, what proportion of your time and energies by 1930 to 1933 was given to the Maine Company and its interests? A. Practically all of it.

Q. 63. Do you remember an occasion in 1927 when you had a discussion with Mr. Prince that had something to do with New Jersey common stock that was pleged in bank accounts on bank loans of F. H. Prince & Company? A. I guess so; yes, sir.

Q. 64. Will you tell us the substance of what he said at that time about conditions and the stock that was pleged? A. Mr. Prince—we were in Mr. Prince's office, and he said, "Mr. McDonough, I am very much alarmed over the present hullaballoo that is going on in the stock market. I don't think there is anything underneath it and I don't believe it is sound. There is going to be trouble. I want you to take and get out of the brokerage business.

get rid of all the accounts we have, even though they belong to friends. Get our money in and get under cover before the storm comes."

He said, "We have a lot of Chicago Junction common stock out with brokers as collateral on these loans and I want you to see to it that just as soon as you can you get that Jersey common stock into the Maine Company."

The Member: Will you read that last portion of the answer starting with "We have a lot of Chicago Junction—"?

(Answer read as follows: "He said, 'We have a lot of Chicago Junction common stock out with brokers as collateral on these loans and I want you to see to it that just as soon as you can you get that Jersey common stock into the Maine Company.'")

The Member: Is that a correct statement or do you want to correct it?

The Witness: That is the correct statement.

The Member: "Chicago Junction common stock"?

The Witness: Chicago Junction common stock; yes, sir; that is the stock in the Jersey Company.

The Member: That is not clear.

Mr. Welch: No.

The Member: You mean the Chicago Junction Railway Company stock which was owned by the New Jersey Company?

The Witness: No, the stock that was owned by Mr. Prince, as I remember it.

The Member: Perhaps you can clear it up.

Mr. Welch: Let us get at it this way:

Q. 65. (By Mr. Welch). Remember, Mr. McDonough, we call the Jersey Company throughout here, the Jersey Company. A. The Jersey Company; yes, sir.

Q. 66. Was it stock of that company to which you were referring? *A.* Stock of that company; yes, sir.

Q. 67. And was the stock about which you were talking stock of that company belonging to the Maine Company? *A.* Yes, sir.

Q. 68. And pledged where? *A.* As collateral with loans.

Q. 69. By what concern? *A.* F. H. Prince & Company.

The Member: What were you saying about the Chicago Junction stock?

The Witness: I should have called it the Jersey Company, sir.

The Member: That is what I asked you; whether you wanted to correct that and you said no, it was correct. I want the record clear. If we can start again. Suppose, Mr. Reporter, you get back to Mr. Welch's original question before that and let us get that answered now, clearly, because it is confused.

(Record read as follows:

"*Q.* Will you tell us the substance of what he said at that time about conditions and the stock that was pledged?")

The Member: Start again, Mr. Witness, and give us the answer.

The Witness: The whole thing?

The Member: Answer this question that is put to you now.

The Witness: Will you read again the question?

(Last question again read.)

A. He said, "Mr. McDonough, I don't like the situation." He said, "There is nothing under this present stock market activity and there is going to be trouble. Before this trouble comes upon us I want to be out of danger. I want to get rid of all of our margin accounts, and," he said, "get them out of the office, and," he said, "in connection with those margin accounts I want you to take up the

stock of the Jersey Company that is now collateral on F. H. Prince & Company loans with the banks."

Q. 70. (By Mr. Welch). You have told us, Mr. McDonough, of a conversation you had with Mr. Prince in 1926 about his plan for the Jersey Company. *A.* Yes, sir.

Q. 71. May I ask you whether or not he has discussed those plans with you at any time since then? *A.* Yes, sir; he discusses with great regularity.

Q. 72. Going back to the years 1930 to 1933, can you tell us some specific time when he had such a discussion with you? *A.* One time in 1933 that I recollect was at the time of the banks closing.

Q. 73. That is when there were plans under way to subordinate funds in the Chicago bank? *A.* Yes, sir.

Q. 74. That, then, would be some time in the spring, in March or April, say, of 1933? *A.* Yes, sir.

Q. 75. Now, will you tell us; if you will, the substance of what Mr. Prince said to you at that time? *A.* Mr. Prince again referred to the obligations of 1940. He told me that the opening of the bank would necessitate the subordinating of at least $4,000,000, and he very definitely made it clear that the Maine Company's subordination was to be treated entirely different from the others.

He was most explicit in his instructions that I should see to it that the Maine Company's deposit would come—

Mr. Clark: Just a moment.

State what he said without characterizing it.

The Witness: I can't state it exactly. I am giving the gist of it.

As near as I can, he was most positive about how he wanted the Maine Company's deposit to be handled.

Q. 76. (By Mr. Welch). Did he say anything further at that time as to what his plans were in 1940? *A.* Yes, sir.

Q. 77. Will you tell us what he said at that time? *A.* He

said he was accumulating the stock of the New Jersey Company, and that he wanted to take and be in a position in 1940 where he would own all of the stock, that he could close up the company and liquidate it in 1940, and at that time he said he wanted $10,000,000 of working capital, free cash, in the till of the Maine Company to meet any emergencies that might arise.

Q. 78. Did he say anything else? Did he say anything about the amount of money that would be required? A. Yes.

Q. 79. What did he say in that respect? A. About $30,000,000 was necessary.

Q. 80. Did he say anything else? Have you exhausted your recollection as to what he said? A. I think he said at that time, like I said before, the company had been in debt since it started and that by 1940 that 50 years was long enough for any company to be in debt, and he wanted to get rid of it, wanted to have all the property into the Maine Company. He just wanted to have one corporation.

Q. 81. Did he say anything about wanting it free of debt? A. Yes, sir. That was the principal theme; that in 1940 he wanted to have this entire property free of debt and $10,000,000 in cash in the treasury.

Mr. Welch: You may inquire, Mr. Clark.

Cross-Examination.

X-Q. 82. (By Mr. Clark). During the years 1930 to 1933, what was Mr. Prince's official connection with the Chicago Stock Yards Company? A. President.

X-Q. 83. Was he a member of the board of directors? A. Yes, sir.

X-Q. 34. And who was chairman of the board? A. There wasn't any chairman of the board.

X-Q. 85. I see. A. You are talking of the Maine Company now?

X-Q. 86. Yes. A. Yes, sir.

X-Q. 87. Now, referring to what we call the New Jersey Company— A. Yes, sir.

X-Q. 88. —during those same years, what was Mr. Prince's connection with that company? A. President and director.

X-Q. 89. And director.

Referring to the Produce Terminal Company— A. Yes, sir.

X-Q. 90. —what was his connection, if any, with that? A. He may have been a director. I am not sure, sir.

X-Q. 91. You don't recall? A. No, sir.

X-Q. 92. Well, you were handling all of his affairs at that time. A. Yes, sir.

X-Q. 93. And you don't remember? A. No, sir; not exactly. He may have been, I don't know. I can't tell you, offhand, about that one.

X-Q. 94. On Western Associates, Inc.— A. Yes, sir.

X-Q. 95. —what, if any, was his connection? A. None.

X-Q. 96. Live Stock National Bank of Chicago? A. Director.

X-Q. 97. Central Manufacturing District? A. Trustee.

X-Q. 98. Central Storage and Forwarding Company? A. None, as I remember it.

X-Q. 99. Chicago Junction Railroad? A. None, as I remember it.

X-Q. 100. What we call the Railway Company? A. Director.

X-Q. 101. Harness & Saddlery Company? A. None.

X-Q. 102. Union Stock Yards and Transit Company? A. Chairman of the board of directors.

X-Q. 103. Do you know whether or not Mr. Prince re-

ceived compensation from any of these companies? A. Yes, sir; I do.

X-Q. 104. And what was that, or from what companies, if you don't know the precise amounts? *A.* I think he received $17,500 a year from the New Jersey Company as president; he received $50,000 a year as president of the Maine Company; and he received $30,000 a year as chairman of the board of the Transit Company.

X-Q. 105. Did he receive compensation from any of the other companies? *A.* No, sir.

X-Q. 106. You were compensated during this period, were you not, Mr. McDonough? *A.* From—

X-Q. 107. I say, you were compensated for your activities? *A.* No, not during those three years; no, sir. I didn't receive any compensation from the Maine Company until '34.

X-Q. 108. No. Didn't you receive any compensations for what you were doing during those years? *A.* Not one penny, sir; no, sir.

X-Q. 109. Didn't Mr. Prince pay you anything? *A.* Why, certainly, Mr. Prince paid me.

X-Q. 110. Well, yes. *A.* Yes.

X-Q. 111. I didn't ask you whether it was from the corporation, or not. *A.* Oh, wait a minute. I am talking about Mr. Prince as a corporation, as president of the Maine Company. I am not talking about Mr. Prince as an individual.

X-Q. 112. Yes, I know, but Mr. Prince paid you, himself, didn't he? *A.* Mr. F. H. Prince & Company paid me; yes, sir.

X-Q. 113. F. H. Prince & Company? *A.* Yes, sir.

The Member: You received no compensation from any of the corporations which are shown on this chart, did you?

The Witness: Not at that time; no, sir.

The Member: Is that what I am to understand?

The Witness: Yes, sir.

The Member: From the beginning of the year 1930 until the end of the year '33?

The Witness: I think—I may have been getting—I think—I don't know just exactly. When I was assistant treasurer of the New Jersey Company, I got a very small salary there, but I don't know exactly. To the best of my recollection, from 1930 to '33, I didn't receive any compensation at all, sir.

X-Q. 114. (By Mr. Clark). How much did you get from Mr. Prince during this period? A. I got $53.84 a week up to 1930, and then it went up. Beginning 1930, it went—I got about a hundred dollars a week up to, I think—well, it amounted to about a hundred dollars up to '33, total; that is, my income.

X-Q. 115. You have spoken about these conversations that you had with Mr. Prince relative to his great fears on account of the expiration of the charter of the New Jersey Company in 1940 and his worry relative thereto, and the fact that he wanted stock of the New Jersey Company acquired by the Maine Company.

Now, do I understand that that stock was pledged with banks at that time?

Mr. Welch: Just a moment. I don't know how important it is, but the first part of the question seemed to me not at all an accurate statement of what he has testified to. For that reason, I am objecting.

The Member: Suppose we let the witness say whether it is an accurate statement or not.

X-Q. 116. (By Mr. Clark). Is what I have stated to you accurate? A. Will you please repeat the question?

(Question read.)

Mr. Welch: The true part of it might be answered.

X-Q. 117. (By Mr. Clark). Well, is it true that you spoke

about that in the record? Do you recall? A. I didn't say anything about Mr. Prince's fears of 1940.

X Q. 118. I didn't say 1940. A. By 1940.

X Q. 119. Relative to 1940. A. Well, he didn't express any fears. He just put it on a business basis, a sound business policy, that he wanted to do it. He wasn't afraid of anything.

X Q. 120. Then I may have a misrecollection, but I thought you stated that he was greatly worried relative to that. Was he or was he not greatly worried relative to the situation in 1940? A. He was worried but he wasn't afraid of it; yes, sir.

X Q. 121. I see.

All right, then, please answer the question.

Mr. Welch: Which question is this, now?

Mr. Clark: The only question which is pending.

Mr. Welch: It is so far back I think it would be fair to the witness—

Mr. Clark: I think you are quite right.

The Witness: Will you give me that question again, please?

X Q. 122. (By Mr. Clark). Well, really, the question is this, and I might restate it:

Was the stock of the New Jersey Company pledged with banks for loans at the time when Mr. Prince told you that he wished it acquired for the Maine Company? A. No, sir.

X Q. 123. It was not? A. That was stock that was already acquired.

X Q. 124. Did it ever occur in conversations between you and Mr. Prince that the bonds of the New Jersey Company should be acquired by the Maine Company? A. Yes, sir.

X Q. 125. What was his idea relative to that? A. Well, Mr. Prince always went on the theory that securities in cor-

porations in which he was active and had full knowledge of were the best securities that he could buy, and that if he could acquire them at a price, that he would buy the New Jersey bonds in the market from time to time, but—

X-Q. 126. Did he buy any? *A.* No, sir.

X-Q. 127. Nor the Maine Company? *A.* No, sir.

X-Q. 128. Why wouldn't that have been the logical step to take in order to protect his position in 1940? *A.* Because he expected and anticipated and was devoting his time to get sufficient money in hand to redeem them, pay them off.

X-Q. 129. But they could have been redeemed if they had been acquired? I mean, they could have been wiped out by acquisition? *A.* I don't think so, sir.

X-Q. 130. Could they not? *A.* No, sir. I think the money would have had to remain with the trustee.

The Member: What were they selling at at that time?

The Witness: At above par, sir, around par, above par. They have always sold up there.

The Member: In other words, he had to pay above par—

The Witness: Pay a premium for it; yes, sir.

The Member: And let them stand until they matured, and mature them at the par value?

The Witness: Yes, sir.

The Member: Did I understand you correctly to say that during these years, when he talked about the forthcoming necessity for liquidating these obligations in 1940—I thought I understood you to say that he would have acquired the bonds if he could have acquired them at a price?

The Witness: Yes, sir.

The Member: That is what you said, wasn't it?

The Witness: Yes, sir.

The Member: Now, do you say that they were selling at that time above par?

The Witness: Around par; yes, sir; I don't know what it was then.

The Member: When you said that he would have acquired them if he could have acquired them at a price, what do you mean by "at a price"?

The Witness: Well, comparing them with what we are picking up the Maine Company bonds, at a price, a going price below the par value of it—you see the Jersey Company bonds held up. The other securities went down.

The Member: No; I am trying to get a more specific meaning to your phrase "at a price."

The Witness: Well—

The Member: He could have bought them "at a price."

The Witness: Yes, sir.

The Member: What did you mean?

The Witness: They weren't selling low enough to warrant it wasn't worth while to call them at the price.

The Member: You mean the price was too high?

The Witness: Yes.

The Member: If he could have got them at a price that he thought was satisfactorily low, he would have done it; is that right?

The Witness: Yes, sir; and he would have depreciated the amount of cash in the Maine Company to take them in. His principal thought first was to maintain—

The Member: What was approximately the level at which he would have thought the price was a satisfactory low price?

The Witness: I couldn't say.

Mr. Welch: If Your Honor please, I was going to say it is very difficult for him to say what Mr. Prince would have thought.

The Member: I know, but I am asking the witness—

The Witness: He never—

The Member: —to express in more detail the statement, the thought which he has already expressed in altogether too vague terms. He has said that Mr. Prince would have acquired them at a price, and he says by "at a price" he meant at a low enough price. Now, I want to know what a low enough price would have been. Does he mean a low enough price at a bargain of 30, or does he mean—

The Witness: Oh, no.

The Member: —a price a shade below par? Or what does he mean? It doesn't mean anything when you say "at a sufficiently low price."

Now, if the witness has any elucidation of that, it is proper to put it in the record.

The Witness: Your Honor—

The Member: If he has elucidation, that fact can appear in the record.

The Witness: Your Honor, he never discussed the price of the Maine Company bonds. It was just in general conversation, general trends. He never put a price on it.

X-Q. 131. (By Mr. Clark). I show you, Mr. Witness, the schedule to which Petitioner has no objection as to the introduction thereof. It refers to the high and low prices on the sales on the market of the New Jersey Company's bonds as reported in Poor's Industrial Section.

I will refer you to the years 1930 to '33, inclusive, and ask you to read for the record the high and low statements thereof. A. 1930, 94-⅛ to 86;

1931, 95-¼ to 90—these are the 4's.

X-Q. 132. Yes. A. 1933, 93-¾ to 82.

On the 5's, 130 is 102-⅜; 1931, 104; 1932, 98½; 1933, 101¼.

The Member: Mr. Welch, do you recognize Poor's as an authoritative statement?

Mr. Welch: We had agreed that those figures could go in.

The Member: Well, I understand they can go in, but is there any dispute about their weight?

Mr. Welch: No, no.

The Member: Is Poor's an adequate disclosure of the quotations of those years, as you will agree?

Mr. Welch: I accept the figures as read by the witness as proper quotations of the prices of these bonds for the years as read.

Mr. Clark: I am not sure whether the lows were read by the witness or not.

The Witness: No, they weren't sir.

The Member: He read the lows as to the 4's, but he didn't read them as to the 5's.

4. (Continuing) In 1930, the lows on the 5's were 98⅛; '31, 90; and '32, 81; '33, 90.

Mr. Clark: Should I offer this now, Your Honor? It properly goes in as part of our case. Does it make any difference to you, Mr. Welch?

Mr. Welch: We have admitted for the record the figures in which you are interested and I don't see why we should have another exhibit now that I have done so.

Mr. Clark: Oh, well, I would like to have it in as an exhibit certainly. That has been agreed to. The only question I am asking is whether at this time you have any objection to its introduction, because I will offer it now.

Mr. Welch: Then I will agree that the sheet may go in as an exhibit and a memorandum of the testimony of the witness as to prices of bonds.

Mr. Clark: Of course there is other data contained herein.

Mr. Welch: If you go beyond the taxable year I am not interested.

Mr. Clark: What do you mean "not interested"?

Mr. Welch: I don't want to clutter up the record with exhibits after the end of 1933.

Mr. Clark: I had understood it was agreed that this might go in as an exhibit.

Mr. Welch: I don't know what our difficulty is, Mr. Clark. I thought we had agreed that the quotations were true and if material, could be offered. I don't think quotations after 1933 are of any interest to us.

Mr. Clark: There, I will agree to, is dispute and that might be held in abeyance. That is the difficulty.

The Member: I think you both, in considering that question, must bear this in mind: It is a frequent dispute, and it is one about which the experience of the Board may be more useful than the lack of experience of counsel, and that is that if you have a dispute as to the admissibility of a particular piece of evidence on the ground that it is after the years in question, if we are going to exclude it on that ground, and if we are expected to exclude it on that ground, it is going to mean that everything after the taxable years in question are going to be irrelevant.

You can't put in, either of you, things that happen after the taxable years and exclude other things on the ground that they are irrelevant. You have got, both of you, to make up your minds now as to whether or not the Board may, in determining its findings of fact, rely upon or look to anything after the taxable years, or have got to close its eyes to everything after the taxable years, because if I let anything in at the instance of one side I am going to let it all in, and if I let it all in you have got to decide for yourselves your want this record to expand to the point that it will be necessary to expand it, to take in such matters.

I am only stating that as an admonition to both of you, for you to make up your minds as to whether you are go-

ing to object to this in the first place, or not? Take a position about it, and then the position will be adhered to, and I don't care very much which way it goes.

Mr. Clark: The testimony on the part of the Petitioner has already gone into the record relative to years other than 1933.

The Member: That was without objection. When testimony goes in without objection I am not called upon to do anything, but now we are at the threshold of a dispute, and I just want you to know that the terms of the resolution of that dispute are going to be at the outset. I am not making any ruling now. I am just warning both of you of what the danger in that position may be.

Mr. Welch: I realize it cuts both ways, but due to the fact we have an enormous quantity of material in the case, in any event, and because I think the proper stand for the Petitioner to take is to end his story with the end of the taxable year, I want to give notice now, Mr. Clark, I want to confine my testimony to the years in question.

Mr. Clark: Just a moment, Your Honor.

The Member: That is usually the Government's position.

(Counsel confer off the record.)

Mr Clark: I understand, Your Honor, that in a case called the Dill Manufacturing Company, with which I am not personally familiar, which is now pending before the Board, that testimony of this character of subsequent years was admitted in evidence over objection in order to show the ultimate disposition of the cash, and so I renew my offer of this exhibit for all years herein contained.

The Member: All I am saying is that if it is to be admitted over objection that the door is going to be regarded as pretty well open for both sides, over objection.

That is to say, I am not going to sustain an objection upon the ground that this is subsequent data when that ob-

jection is made by one side with regard to a specific thing, and then overrule the objection in another instance when it is made on the same ground. I am going to be consistent and I want you both to know I am going to be consistent, and when the door is open, the door is going to be pretty widely open, because I am not so concerned nearly so much with the accumulation or non-accumulation of matter in this record as I am to see to it that I conduct this hearing fairly to both sides, and if one side wants everything in that is after the event, the other side is entitled to have it in.

I am not going to make any meticulous distinctions in that respect.

Mr. Clark: With that position, I could take no quarrel and I think it is absolutely proper.

The Member: The reason I am saying it is that, very frequently, I find counsel thoughtlessly objecting to a little, picayune piece of evidence that they think should not be in there, and 10 minutes later insisting on something like this piece of evidence going in.

Bear in mind, now, what my attitude will be. It is the attitude of preserving the equilibrium.

Mr. Welch: Could I be allowed to say a word, if Your Honor please?

The Member: Yes.

Mr. Welch: I don't feel embarrassed or worried about the conversation that is going on except to this exhibit. I have had experts who are going to testify; they have had to prepare and work on a great deal of data and they have made some charts which I hope are of some use in showing what they are talking about, and because of the fact that the stipulation took us through 1923, and because of the fact I mean to offer no evidence beyond that year, all that mechanical work has been done on the basis of 1933, and it just happens to be practically impossible for me to

re-do some things that have been done that, you might say, are in print, and extend them two or three years.

In the past, I studied a good many cases, as Your Honor has stated, and the Government is inclined to close the door. I thought it would be quite simple if the Petitioner, for once, would end the testimony with the year in question. I supposed I could do so if I wished.

I only say to Your Honor if I can't do it, however, I wish I could, because I am going to be embarrassed with some charts that come to an end at the point I thought they should come to an end, which was 1933.

Mr. Clark: I renew the offer, Your Honor.

Mr. Welch: I don't think there is any point in having a battle about this little thing, but for the sake of the principle involved I think I will object and save my exception.

The Member: That necessitates my inquiring from counsel what is the theory upon which it is expected that the Board may look into the years subsequent to the years in question in order to decide whether section 104 is applicable during the years in question?

Mr. Clark: Yes, Your Honor. The reason is because of the insistence of Petitioner that this event is going to occur in 1940 which, as they state, will require a great expenditure of money on the part of the Maine Company; that the Maine Company will have to look after the situation of the New Jersey Company.

For that reason it is essential that we know what happened during the years, or what may happen during the years between 1933 and 1940.

Mr. Welch: Could I say a word at that point, Your Honor?

The Member: Yes.

Mr. Welch: The case, I take it, must be tried on the basis of what the officers of the Maine Company were do-

ing and thinking in the years 1930 to 1933 and what they reasonably might anticipate the future might be.

Let us assume, which is not at all the fact, but let us assume, if Your Honor wishes, that by, say, three years later the Government could show the Maine Company had four times what was needed to liquidate the Jersey Company. That would only go to show that four years later the Maine Company had liquidated the funds.

I want to try the case, as I had supposed I could, as best we can from the point of view what the men were doing at the time in question and as we well know there have been cases which the Board has decided, a 104 case against a taxpayer in one year and four in another year of the very series that were tried in a single hearing before Your Honors, so I can't see, if we assume Mr. Clark, in some magical way, could prove in 1934 we fearfully and unreasonably accumulated surplus, it would not be any evidence that we had made that grade and done that thing in the prior year.

The Member: I will overrule the objection.

Mr. Welch: I would like to save my exception.

The Member: Yes. As far as I can do so, I will say exceptions are allowed to the adverse party in all rulings.

You must decide for yourself, however, whether that is satisfactory to the Circuit Court of Appeals.

Mr. Welch: I probably will save my exceptions from time to time.

The Member: I understand that is the spirit of the new federal rules and we are to abide by it.

I just mention that for your information.

Mr. Welch: I am interested to hear Your Honor's expression of an opinion that the new federal rules are the opinion of this court, now.

The Member: They do not apply here. Technically, they

do not, but the Circuit Court of Appeals may get itself into the state of mind where it thinks it follows the new federal rules.

(The document so offered and received in evidence, was marked "Respondent's Exhibit B," and made a part of this record.)

X-Q. 133. (By Mr. Clark). My recollection, and I don't want to make any mistake in this regard, that Mr. Prince was concerned about the expiration of the charter of the New Jersey Company in 1940. A. Yes, sir.

X-Q. 134. Did he, or you, in his behalf, take any advice of counsel or inquire into the—well, as to whether the New Jersey charter might be amended, continued, or renewed in 1940? A. Yes, sir.

X-Q. 135. And what did you receive, as that advice? A. That it could be, under the laws, if the laws were complied with, that it could be extended.

X-Q. 136. You have spoken about instructions given by the Maine Company to the operating companies in Chicago during the years in question. How were those instructions given? A. Either in person or by telephone.

X-Q. 137. When you say "in person," you mean by yourself? A. Or Mr. Prince; yes, sir.

X-Q. 138. One or the other? A. One or the other; yes, sir.

X-Q. 139. Was any corporate action taken by the Maine Company in those occasions? A. If the occasion warranted.

X-Q. 140. Well, I say, was it taken? A. I couldn't tell you offhand.

X-Q. 141. Do you recall any instance in which it was taken? A. None offhand; no, sir.

Mr. Welch: I take it the question "corporate action" was

meant to indicate something in the nature of resolutions of board of directors.

The act, Mr. Clark, of any officer of a corporation is, of course, the act of the corporation.

Mr. Clark: That is for His Honor's construction under the facts in the case, it seems to me.

That is all, Mr. McDonough.

Redirect Examination.

Q. 142. (By Mr. Welch). In the last question when you were asked whether or not the Maine Company took any corporate action from time to time, what sort of corporate action did you understand the question to mean? *A.* Was there a meeting of the board of directors taken when each one of these transactions or things took place.

Mr. Welch: That is all.

(Witness excused.)

Mr. Welch: Mr. Donovan.

MR. JAMES F. DONOVAN

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Welch). What is your full name, sir? *A.* James F. Donovan.

Q. 2. And where do you live? *A.* Providence, R. I.

Q. 3. Were you sworn, just now? *A.* I was.

Q. 4. Are you associated with the Maine Company, the taxpayer in this case? *A.* I am.

Q. 5. In what capacity? *A.* I have charge of its books which are kept by me or under my direction, and I also have charge of the securities with another employee of the Chicago Stock Yards Company, and I take care of a great

deal of correspondence of the Chicago Stock Yards Company, and I am also assistant to Mr. McDonough, the vice-president.'

Q. 6. As assistant to Mr. McDonough, what are your duties? *A.* Well, in Mr. McDonough's absence, I have frequent telephone conversations with Chicago.

Q. 7. And I take it by "Chicago," you mean the men with the operating— *A.* I should say the operating men at the different companies in Chicago, and I go to Chicago, not very frequently, but once in a while.

Q. 8. Were the duties that you now have substantially, in the years 1930 to 1933, the same? *A.* They were with the exception that my assistance to Mr. McDonough was less.

Q. 9. How far back did your connection with the Maine Company go? *A.* About 1920.

Q. 10. Are you familiar with the transactions between the F. H. Prince & Company and F. H. Prince and the Maine Company from 1920 forward? *A.* I am, sir.

Q. 11. In the years 1930 to 1933, what was your connection with F. H. Prince & Company? *A.* I had charge of the books of F. H. Prince & Company and I had charge of valuing collateral on the loans with the bank loans, and also the loans with the Maine Company.

Q. 12. Anything in respect of the New York Stock Exchange in your charge? *A.* Yes, every 6 months F. H. Prince & Company has to make out a so-called questionnaire for the New York Exchange, and I have to prepare that, which includes valuing collateral, and, in fact, all of the assets with F. H. Prince & Company.

Q. 13. How far back does your connection with F. H. Prince & Company go? *A.* About 1918.

Q. 14. At about what time did you begin to be responsible for making entries in the books of F. H. Prince & Company? *A.* Oh, about 1920.

Q. 15. Between the years 1920 and 1933, did your duties with F. H. Prince & Company involve the evaluation of securities, in any way, other than the way you have just told us? A. Between 1920 and 1933?

Q. 16. Yes. A. I should say F. H. Prince & Company was an active brokerage business.

I mean by that a stock brokerage business and, of course, like all stock brokers, they maintained margin accounts, customers' rooms, board rooms, so-called, telegraphers, and in this I also either directly or assisted in valuing the margin accounts and the collateral which were pledged on F. H. Prince & Company loans; that is, customers' collateral and F. H. Prince & Company collateral, also.

Q. 17. Have you worked with counsel, I guess at both tables, in the preparation of the stipulation of facts? A. Yes, sir; I have.

Q. 18. On file in this case.

About how long were you engaged in—when did you begin that work? A. I should say about the first of August.

Q. 19. And have you worked fairly steadily from that time forward until very close to the time of trial? A. I have.

Q. 20. What did you do in connection with the stipulation over which six of us labored, as we did labor? A. Well, I assembled all of the legal documents, and assisted in preparing facts and figures to go into the stipulation.

Q. 21. Schedules and things of that sort? A. Schedules and different things that went in.

Q. 22. Is there anyone, Mr. Donovan, to your knowledge, who is more familiar with the details of transactions between F. H. Prince & Company and the Maine Company from 1929 even to the present day than you? A. I don't believe there is, sir, as to the details.

Q. 23. Would you tell us, Mr. Donovan, in a general way

what the activities of F. H. Prince & Company have been as you have observed them, say, from 1918 forward? A. Well, as I have previously testified, they were brokers, stock brokers, members of the Boston, New York, and Chicago Stock Exchanges, and they maintained a general brokerage business including margin accounts for numerous customers. This continued until, I should say, around 1927, when, upon instructions from Mr. Prince, the margin business was stopped and cut out. Mr. Prince said that no more margin accounts should be taken, and as a result of that we began to liquidate the so-called margin accounts and deliver the securities to the customers when they were released from bank loans.

Q. 24. Does F. H. Prince & Company any longer continue with ticker service? A. Well, F. H. Prince & Company continued its ticker service from 1927 until, I should say, about 1931 when even the tickers were removed from the office of F. H. Prince & Company.

Q. 25. Any board room now or anything of that sort? A. The board room was—I can't say taken out, but I mean began to be used as a clerk's room in 1931. What was the board room became a clerk's room.

Q. 26. What were the relations between the Maine Company and F. H. Prince & Company, let us say, from 1926 to '27? A. Well, the Maine Company had practically the same relationship as any other customer. They were on the books of F. H. Prince & Company as a customer with a debit balance. F. H. Prince & Company purchased securities for them the same as they would for any other customer, and there was interest charged on the debit balance.

Q. 27. Were brokerage commissions charged? A. Oh, in the purchase of securities, they are always charged.

Q. 28. How long did that relationship of broker and customer continue? A. Well, the relationship of broker and

customer continued up to the present time, but in 1922—yes, in 1922 the Chicago Stock Yards Company, or, at least, the Maine Company, in this case, they began to pay cash for their purchases of stocks and bonds, when they bought them.

Q. 29. Prior to that time they had not been paying cash for purchases? *A.* No, just sort of a margin account. At least it was an account that was secured by stocks and bonds.

Q. 30. In 1922 and prior thereto, what was F. H. Prince & Company buying for the account of the Maine Company? *A.* F. H. Prince & Company was buying New Jersey Company common and Maine Company 5 percent bonds.

Q. 31. Taking the New Jersey common, let us say, up until 1921, how many shares of it did F. H. Prince & Company purchase? *A.* Oh, in the neighborhood of 20,000 shares.

Q. 32. And at a cost of approximately what? *A.* About 3½ million dollars.

Q. 33. Now, after 1922, did the purchases of Jersey common continue? *A.* Yes, they still continued.

Q. 34. But on what basis as to whether cash was paid by the Maine Company or not? *A.* Well, the purchases continued, but when the purchases were made the Maine Company would give F. H. Prince & Company a check. They were cash, really.

Q. 35. Did F. H. Prince & Company make any purchases other than purchases of Jersey common for the Maine Company after 1927?

Mr. Clark: Your Honor, I am going to object to this because it seems to me as though this is matter for introduction of book records in substantiation.

Mr. Welch: We have the books in the courtroom.

Mr. Clark: Yes.

Mr. Welch: And he will testify presently to summaries from the books.

Mr. Clark: I see.

Mr. Welch: They are here for your examination at any moment, Mr. Clark.

Mr. Clark: Well, I think I would prefer to have that go in in the first instance by book records.

Mr. Welch: Much of this is just—you can't make sense out of it, Mr. Clark, without a witness explaining the books and using schedules.

Mr. Clark: I know, but he should have the books before him.

Mr. Welch: They are here. If you would be happier if he has them before him, they can be placed there now.

Mr. Clark: I would like to have Mr. King satisfied relative thereto. It is nothing of which I am familiar in detail, naturally, but I do think the witness should testify from the books and not.

Mr. Welch: The one I have to satisfy is His Honor. I am very happy to please Mr. King, but I have to prove my case in some way, Your Honor, and I don't think we will all be happy struggling around with books. I think Mr. King will be quick to tell you he has confidence in anything prepared by Mr. Donovan and myself as almost sure to be accurate.

Mr. Clark: Yes, Your Honor, but I think this ought to go in from the books in the first instance.

The Member: Well, the Respondent is entitled, of course, under the best evidence rule, to the primary records of transactions such as these.

Mr. Welch: I have those available, but—

Mr. Clark: What I was going to suggest, Your Honor, was that we have a recess for a few minutes during which time we may look at the books.

The Member: Oh, yes. If it can be done that way, we will suspend, then, for five or ten minutes.

(There was a short recess taken.)

Mr. Clark: We haven't quite finished conference as yet, Your Honor. It won't take but just a minute or two, I think. Petitioner has gone to get some books which they will bring down. May we have a moment or two more?

The Member: Yes.

Mr. Welch: Mr. Clark, could we confer at the bench a moment about it?

Mr. Clark: I don't see anything relative to it that we could confer about it.

The Member: We are not getting along rapidly. The question is whether you can get along without these books.

Mr. Clark: We have to see them first, Your Honor.

The Member: Where are they? That is what I thought you were conferring about.

Mr. Clark: Well, I understood that they were upstairs and would be brought down.

Is that correct?

Mr. Green: They are on the way down.

The Member: We will suspend the consideration and go to something else, then, if the books are necessary to be here. The Respondent is entitled to have the books, and if they are not here we will have to go on to something else until such adjustment is made of that requirement.

Mr. Welch: I would like to say at this point that with infinite labor we at this table have prepared this testimony in what we hoped was an orderly fashion, and we think we can put it in, certainly truthfully, and in an understandable way.

I will say, Mr. Clark, that if we have to wade through books entry by entry, I would suppose we would spend at least a week with this witness on the stand and come out

just where we would if we went ahead on schedules that you may check at any time and substitute other schedules for if you find ours inaccurate.

Mr. Clark: We are not going to wade through book entries entry by entry. His Honor is well aware of the way in which we always confer and spot check, and we won't have any difficulty, I am sure, if we have an opportunity to see the books and then go through in that fashion.

Mr. Welch: Thank you. Thank you.

Q. 36. (By Mr. Welch). Now, let's go slowly—

The Member: Now, as I understand it, the Petitioner is at least provisionally going ahead with this type of evidence upon the assurance that within the next few minutes the books themselves are going to be not only in the court room but open to Respondent's Counsel for checking as he goes along, and if my understanding is correct, then, you have had these books mutually before you now for a long time. There is no need to fear—certainly no need to fear deliberate inaccuracy, and not much need to fear inadvertent accuracy under those circumstances, but you are entitled to have these books here to check, but that is no reason why we should hold up the proceedings.

Mr. Clark: No, Your Honor, except that if this evidence runs into the record without our opportunity to check from the books in the meantime relative to it, and I will say frankly, so far as I am personally concerned, I am not familiar with the books. I have to depend on my associates in that regard but if we do that, how does the record stand?

The Member: Well, the record stands as all record stands, subject to your disclosing errors and inaccuracies on your cross-examination. It has never been true that the Petitioner couldn't put in his case because of the fear that some of the evidence that he puts in may be incorrect, because

that is what the province of cross-examination is, as I understand it.

Mr. Clark: I will have to object to any further testimony in this regard with the witness relative to what the books contain.

The Member: I think that you are not entitled to have that objection sustained, in view of the fact that Petitioner has made his plain offer, which I have no reason to doubt the honesty of, that he will have the books here within a few minutes, and from those books you are entitled to make a motion to strike or in any other way to protect yourself from inaccurate testimony which is not in conformity with the books. If it were not for the proffer of having them here within a very few minutes I should have another problem, but I haven't that problem.

Mr. Clark: Well, that is my understanding. They will be here in a few minutes; is that correct?

Mr. Welch: Not only that but I am going to turn to a type of general questions that I think will really obviate, at least for the moment, any such problem.

I will go slowly and I don't think I will run into anything that is going to bother you at all, Mr. Clark.

I would like the last question.

(The question was read as follows:

"Q. Did F. H. Prince & Company make any purchases other than purchases of Jersey common for the Maine Company after 1927?")

Mr. Clark: "For the Maine Company" is what I am interested in, and I object to the question, because I think the books should be here in order to show whether those purchases were made.

The Member: The objection is overruled.

Mr. Clark: Exception.

I understand it isn't necessary to take an exception?

The Member: As far as I am concerned, it isn't. Don't ask me to speak for Judges Bingham, Wilson, and McClellan.

The Witness: Would you please read the question?

The Member: Does this record show where the return was filed so that we may know the venue for an appeal? I mean, does the stipulation contain that?

Mr. Welch: Now and then I have heard that discussed as to the possible circuit court that we would go to if we went there, and I just don't know the answer.

The Member: Well, see that the record does contain it at some time. It doesn't matter now.

Mr. Welch: The returns are finally going in, so that will settle it.

Will you read the last question?

(Question again read.)

Q. 37. (By Mr. Welch). You can answer that just "yes" or "no," I think. *A.* It isn't quite clear to me. I am awfully sorry.

The Member: Well, restate the question.

Suppose you put the question again. It isn't clear to the witness.

Mr. Welch: I think I will pass it and go ahead to further points in the testimony that I want to bring out.

Q. 38. (By Mr. Welch). Let's turn to the years 1930 to 1933, and tell us during those years what were the business activities of F. H. Prince & Company. *A.* Well, as I previously testified, F. H. Prince & Company practically closed up its business in 1931 with the exceptions of a cash business, and after '31—that is, '31, '32, and '33—they only had, oh, four or five customers, three or four of them being Boston banks in which the Maine Company had the major portion of their deposits, and the Maine Company, itself, was a customer.

Q. 39. Can you give us some examples of the sort of things done by F. H. Prince & Company at the request of the Maine Company other than executing mere orders for purchases during those years? *A.* The years '30 to '33?

Q. 40. Yes. *A.* Well, in 1931 F. H. Prince & Company purchased—I beg your pardon. I don't mean "purchased," but—yes, they did. They purchased accounts and notes of the Central Manufacturing District Bank in Chicago in their own name, and they were so carried for the account of the Maine Company with funds furnished by the Maine Company.

In 1932, I believe it was, they subscribed to—F. H. Prince & Company subscribed to 50 shares of Pan Corporation stock, which was carried in the name of F. H. Prince & Company for the benefit of the Maine Company.

Q. 41. In 1933, did F. H. Prince & Company buy some Armour stock with money supplied by the Maine Company? *A.* Yes, in 1933 F. H. Prince & Company purchased a little bit over a million dollars of the Armour & Company stock with funds furnished by the Maine Company.

Q. 42. You say "funds furnished"; was that furnished— *A.* Furnished in the form of bonds.

Mr. Clark: All this, Your Honor, runs so much in the line to which I have been objecting, that I hate to have it go into the record at this time.

The Member: I am afraid you can't help it. If an objection were made I would have to overrule it.

Mr. Clark: I will make another objection.

The Member: I will overrule it.

Mr. Clark: And I will take an exception, if it may be granted.

Mr. Welch: Would you read the last question and answer?

(Last question and answer read.)

The Witness: I would like to explain that answer more fully.

A. F. H. Prince & Company purchased about a million dollars of Armour & Company stock. They paid for it with funds furnished in the form of notes. In other words, they borrowed money from the Maine Company to pay for these shares of stock.

Q. 43. (By Mr. Welch). During this same period was F. H. Prince & Company active in any way about acquiring stock in the Jersey Company? *A.* Yes, F. H. Prince & Company continued to purchase stock in the New Jersey Company for the Maine Company.

Q. 44. Was it particularly active in locating stock for purchase, or anything of that sort? *A.* Well, not so very active because the amount of outstanding shares decreased considerably. It did a tremendous amount of work in trying to locate these shares; buying some shares, of course.

Q. 45. Was the purchase of Jersey common a new activity for F. H. Prince & Company in 1930 to 1933, or had it been going on before? *A.* It had been going on before 1918 — well, at least since 1918, since I was there.

Mr. Welch: Would somebody supply the witness, please, with a copy of S-65, S-66, and S-67?

(A bound volume of documents was handed to the witness.)

Q. 46. (By Mr. Welch). Have you, at my request, examined these schedules S-65, S-66, and S-67, in preparation for your testimony here? *A.* I did.

Q. 47. Are you personally familiar with the transactions that are represented in those schedules? *A.* I am from 1920 on.

Q. 48. Did you have anything to do with the book entries that lie behind these schedules that we have here? *A.* I

did. I either made them or directed how they should be made.

Q. 49. Now, looking at S-65, do you find an item there of $3,433,694.35 as due F. H. Prince & Company on December 31, 1918? *A.* I do.

Q. 50. Can you tell us from the bottom of that sheet, if you need it, what that item is? *A.* I can.

Q. 51. Will you do so? *A.* This represents the amount paid by the Maine Company of the following securities:

17,929 shares of New Jersey common at a cost of $3,190,339.96.

286,000 Maine Company 5 percent bonds, $243,354.39.

Totals cost of $3,433,694.35.

Q. 52. Was this a payment by the Maine Company or a charge to it, on the books? *A.* This was a charge.

Q. 53. Now, will you look at the year 1921 when there is a decrease in the balance in that account from $3,362,234.13 to $1,712,441.52, and ask you if you can explain the transactions that go into causing that decrease and how the decrease came about? *A.* I can.

Q. 54. Will you do so? *A.* I will first explain how the account works.

In this account is charged purchase of securities and interest charges, regular interest charges, as in any open account.

The account is credited with dividends on any shares that are in the account. In this particular case the 17,929 shares.

Also with the bond interest, coupon bond interest on any bonds that were long in the account.

Q. 55. That were "long in the account"? *A.* Long in the account. That is the ordinary principal.

The account is also credited with any payments of cash or any other payments. In this particular instance, the Chicago Stock Yards Company, or Maine Company, turned

over to F. H. Prince & Company in November of 1921 1,500,000 Maine Company 7 percent debenture bonds.

They were received by F. H. Prince & Company and credited in this account at their par value, namely, $1,500,000

This caused a reduction in the account to $1,712,441.52 as shown on this S-65.

Q. 56. Now, will you glance for me for a moment at S-62. Do you have that before you, Mr. Donovan? *A.* Yes.

Q. 57. And do you notice there in the year 1921 the Maine Company bought $26,000 face value of its 5 percent bonds for $14,673.74. *A.* I see that.

Q. 58. Can you tell us whether or not F. H. Prince & Company had anything to do with the purchase of those bonds? *A.* Oh, yes, F. H. Prince & Company purchased them for the Maine Company.

Q. 59. Do you know how they were bought? *A.* In the open market.

Q. 60. And now will you tell us the average cost per bond of the bonds purchased during that year? *A.* About $565 for a thousand dollar bond.

Q. 61. How were these 5 percent bonds of the Maine Company secured? *A.* There were five shares of New Jersey Company common pledged behind each $1,000 Maine Company 5 percent bond.

Q. 62. How was the $1,500,000 worth of 7 percent Maine debentures, which you testified the F. H. Prince & Company took in at their face value, secured? *A.* There was no security behind those outside of the credit of the company.

Q. 63. Then do I gather from your testimony, Mr. Donovan, that at the same time F. H. Prince & Company accepted the $1,500,000 unsecured debentures of the Maine Company at par value in partial payment of a debt of the Maine Company to the F. H. Prince & Company, they were actually

buying secured bonds of the same company in the open market at about 56½? A. That is correct.

Q. 64. Now, Mr. Donovan, turn your attention to that account in 1922, will you, please? A. What account is that?

Q. 65. This schedule, which is S-62. I am unhappily without a copy of it before me.

The Member: I am sorry to interrupt this again, but I am greatly concerned about the fact that the stipulation exhibits are so frequently in carbon copies, which is not in conformity with the rules, and is very inconvenient—where are the originals and why are they not here?

Mr. Green: I think it is the one that the witness has.

Mr. Welch: I think you have got the spare tire, so to speak.

The Member: Which is the one officially in evidence?

Mr. Welch: The one the witness has.

The Member: I don't care, as far as reading it is concerned. I just want to be sure the official copy is an original and not a carbon.

Mr. Welch: It is an original, Your Honor.

The Member: Very well.

Q. 66. (By Mr. Welch). I am now directing your attention, Mr. Donovan, again to S-65, and I observe, I think that from this schedule the amount due on the open account from the Maine Company to F. H. Prince & Company decreased from $1,712,441.52 to $717,001.28 during that year, and it also appears that there was no longer due at the end of that year anything from the Maine Company to F. H. Prince & Company represented by the 7 percent debentures.

Will you tell us what the transactions were which resulted in these changes in this account? A. Well, they were the usual debits and credits that I mentioned previously consisting of credits in the form of dividends on stock and also

in the form of bond coupons and charging the accounts for interest on the open account.

Besides that, in June of 1922 the Chicago Stock Yards Company, or the Maine Company, delivered to F. H. Prince & Company $2,000,000 of Maine Company's 7 percent debenture bonds in payment for the one million and a half of them to be accepted in payment of the $1,500,000 previously issued in 1921.

The additional $500,000 was credited to this account.

Besides this $500,000 in bonds, the Maine Company also paid F. H. Prince & Company $300,000 in cash, which also was credited to the account.

Q. 67. Although you have told us that F. H. Prince & Company received $2,000,000 in 7 percent debentures of the Maine Company during the year 1922, there nowhere appears in this schedule anything to indicate that the Maine Company was indebted to F. H. Prince & Company in the amount of $2,000,000 represented by these new debentures; is that true? A. That is correct.

Q. 68. What is the explanation of that? A. Well, in June of 1922 these $2,000,000 worth of Maine Company's 7 percent debentures, together with the $300,000 in cash that I previously mentioned, they were turned over to F. H. Prince personally to be used in payment of the 15,520 shares of Maine Company common stock which Mr. Prince purchased from Mr. J. Ogden Armour.

Q. 69. In that year? A. In June of 1922.

Q. 70. Now, would you turn to the stipulation itself. Have you that before you? A. No, I haven't.

Q. 71. I beg your pardon.

(A copy of the stipulation was handed to the witness.)

Q. 72. Will you look at the bottom of page 30 and the top of page 31 and tell us whether or not the transaction you have just described is the one mentioned in the para-

graph beginning in parenthesis (a) at the bottom of page 30? A. Yes, that is the transaction.

Mr. Welch: I think perhaps it will be making the record clearer for anyone reading it if you will read that portion of the stipulation at this time.

The Witness: Beginning at "(a)"?

Q. 73. (By Mr. Welch). Beginning with the paragraph "At the time—." A. "At the time when F. H. Prince acquired the 15,520 shares of Maine Company stock, from J. Ogden Armour or Armour & Company, J. Ogden Armour or Armour & Company received the following:

"(a) From F. H. Prince, $300,000 in cash and $2,000,000 in bonds of the Maine Company issued under the indenture attached hereto marked S-50, which bonds, F. H. Prince received from F. H. Prince & Company. Said bonds were reacquired by the Maine Company from J. Ogden Armour or Armour & Company in December of that year for $1,860,000."

Q. 74. On page 31 of the stipulation, do you see a reference to a decree? A. I do.

Q. 75. Have you that decree or has Mr. Green that decree?

Mr. Green: I have it.

Mr. Welch: This, Mr. Clark, was the decree under which Mr. Armour was ordered to dispose of his stock in the Maine Company, and it is an official certified copy, and I want to offer it, if I may.

The Member: Is that, by the way, the famous consent decree?

Mr. Welch: It is.

Mr. Green: In the so-called "Packers Case."

The Member: Another thing, while this is going on: Throughout the exhibit I notice references made at one place or another to F. H. Prince & Company, Inc. There

are other references which have been made throughout the trial to F. H. Prince & Company, which was described by counsel as an unincorporated—let me, for short, call it an organization—although it was apparently described as not being even that.

I want to be sure that throughout the record we can rely upon counsel and the witnesses to see to it that whenever F. H. Prince & Company, Inc., is referred to, that the fact will be made clearer that there will be no confusion about F. H. Prince & Company, which is the unincorporated whatever—and F. H. Prince & Company, Inc., which is the corporation.

It is a very easy thing for counsel to slip up on, and I hope you will make it clear when you are referring to that.

Am I correct in believing that the corporation of that name, namely, the "Inc." is the one which will be only rarely referred to?

Mr. Welch: That is correct.

The Member: So that it is easier, as a matter of mechanics, to be sure that whenever you mean that corporation you will expressly say so, and that when that corporation is not expressly referred to you mean we may take it that you are referring only to the name F. H. Prince & Company, which is not incorporated. If that can be clearly understood, the record will be free from confusion.

Mr. Welch: There is, I take it, no objection to this document, Mr. Clark.

Mr. Clark: No objection.

(The document so offered and received in evidence, was marked "Petitioner's Exhibit 23," and made a part of this record.)

Mr. Welch: That is to be described in the record as the decree of February 27, 1920, in the so-called "Packers Case"; that is probably sufficient identification.

I will read paragraph 10, with Your Honor's permission, not from the actual exhibit but from a printed copy which I am confident is accurate. It is much easier to read from this copy.

Paragraph tenth of Exhibit 23 is as follows:

Tenth. That within ninety days after the entry of this decree such of the defendants as have interests in public stock yard market companies, stock yard terminal railroads, or market newspapers, shall file in this court, for the court's approval, a plan or plans for divesting themselves of all ownership or interest in: (1) public stock yard market companies; (2) stock yard terminal railroads; (3) market newspapers; provided, however, that the court may, in the event that it deems such provision necessary in order to enable the defendants to divest themselves of their interests in public stock yard market companies and stock yard terminal railroads, upon reasonable terms, permit the individual defendants, or some of them, to retain an interest by way of stock ownership, or otherwise, in any public stock yard market company or stock yard terminal railroad, or in any corporation organized to take over such public stock yard market companies or stock yard terminal railroads or the stock thereof; but no defendant or defendants shall at any time, either individually or jointly, own a controlling interest in any stock yards or stock yard terminal railroads. Within such period of time after the entry of this decree and the approval of said plan or plans as the court may determine, the defendants shall, in good faith, completely divest themselves of all such ownership or interests in public stock yard market companies, stock yard terminal railroads, and market newspapers. If, within the time so fixed, the defendants shall not have disposed of said interests ordered by the court to be disposed of, and the court upon application shall determine that the defendants have been unable,

despite due diligence, to dispose of the same upon reasonable terms, the court may extend the time during which such ownership, control, or interest may continue until the same can be disposed of."

Q. 76. (By Mr. Welch). Will you look at page 28 of the stipulation for a moment, Mr. Donovan, and tell me whether or not the $1,500,000 of debentures issued by the Maine Company on October 15, 1921, are the debentures which you referred to in your testimony with reference to the year 1921? A. They are.

Q. 77. And, once more, the debentures of $2,000,000 face value issued on June 1, 1922; are those the debentures which you referred to in connection with your testimony with that year 1922? A. They are.

Q. 78. Now, Mr. Donovan, let me call your attention to the transactions between F. H. Prince & Company and the Maine Company during the years 1923, 1924, 1925, and 1926, directing your attention to the open account and the demand notes, and, naturally, also directing your attention to S-65, and will you please state to us what transactions occurred between the Maine Company and F. H. Prince & Company during those years, that are reflected in that schedule? A. 1923 to 1926?

Q. 79. Yes. A. Well, to begin with, in 1923 F. H. Prince & Company borrowed from the Maine Company $25,000, which was repaid in 1924. That was the only borrowing of funds during those years.

The open account of the Maine Company in the books of the F. H. Prince & Company, this account continued to be credited with the dividends, bond interest, and, of course, charged interests on the debit balance until at the end of 1926 the account had decreased from a debit balance at the beginning of 1923 of $717,001.28 to a credit balance due to the Maine Company of $187,867.08. This made a total in

debtedness to the Maine Company of notes and open account of $947,867.08.

Q. 80. Well, during these years 1923 to 1926, was F. H. Prince & Company continuing to purchase New Jersey common stock for the account of the Maine Company? *A.* They still continued to purchase them, the New Jersey common stock.

Q. 81. Now, are those purchases reflected in this open account? *A.* No, because the purchases were made and charged to the account, and the Chicago Stock Yards Company gave F. H. Prince & Company cash to pay for them.

Q. 82. Now, you testified, I think, that in 1927, F. H. Prince & Company inaugurated a new policy about margin accounts.

Have you so testified? *A.* I have so testified.

Q. 83. What was that new policy? *A.* Well, no more margin accounts were to be opened, and all those accounts were to be cleaned up.

Q. 84. As a consequence of that change, what, if anything, was done about old accounts? *A.* The old accounts were closed out by F. H. Prince & Company; that is, the customers paid their unpaid balances and took them up.

Q. 85. Was an examination of all accounts in the office of F. H. Prince & Company made at that time? *A.* Oh, yes, sir; a thorough investigation of all accounts was made in 1927.

Q. 86. And as a consequence, was something done to all accounts? *A.* Yes. There was a general clean-up of the whole business in 1927.

Q. 87. Well, now, in connection with that general clean-up, was anything done about the account with the Maine Company? *A.* Yes, there was.

Q. 88. Will you tell us what was done with that account, taking the stipulation and the exhibits before you and go-

ving as slowly and as carefully as need be to explain what was then done with the account of the Maine Company? A. Well, the Maine Company—well, to begin with, Mr. Prince, personally, borrowed from the Maine Company $1,200,000 and 11,000 shares of New Jersey Company common, and $150,000 of Maine Company 5 percent bonds. He put up as collateral for that 15,000 shares of Chicago Stock Yards Company common, or the Maine Company.

Q. 89. When you say he put up as collateral for that, you mean he put up with the Maine Company? A. Oh, he put up with the Maine Company. He did this personally with the Maine Company.

Q. 90. O. K. Go ahead. A. Mr. Prince then took the $1,200,000 and turned it over to F. H. Prince & Company. F. H. Prince & Company then paid off the balance that was due to the Maine Company in the form of notes; namely, $760,000, and an unpaid balance which was the credit balance I previously speak about of $422,000 and some odd, making a total payment to the Maine Company of about $1,182,318.38.

Q. 91. On that payment what happened to the obligations of F. H. Prince & Company to the Maine Company? A. Well, that cleaned up any notes or any open account that F. H. Prince & Company owed to the Maine Company.

Q. 92. Did Mr. Prince actually receive any Jersey Company shares of Maine Company bonds at that time? A. No. Mr. Prince didn't actually receive them, for this reason: F. H. Prince & Company had the shares pledged on all of their outstanding bank loans.

Q. 93. By the term "these shares," you mean what? A. There were—

Q. 94. I mean to ask— A. The shares were the New Jersey Company common shares.

Q. 95. Yes. A. And there was, oh, around 11,000 of these shares pledged on bank loans, and 50,000 of the Chicago

Stock Yards 5 percent bonds pledged on F. H. Prince & Company bank loans.

Q. 96. Yes. *A.* Now, we couldn't physically return the New Jersey Company stock over to the Maine Company, so Mr. Prince took over the obligation to return them to the Maine Company, but we did—F. H. Prince & Company did return to the Maine Company the difference between the 11,000 Mr. Prince borrowed and 14,755 which was long in that account at that particular time. So they returned 3755 shares of the common stock, New Jersey Common stock, and 22,000 Maine Company 5 percent bonds.

Q. 97. Then what was the situation as to what Prince & Company was to do with Jersey common as its bank loans were paid? *A.* Well, as F. H. Prince & Company then paid off bank loans in the future in which Jersey Company common was pledged, they sort of made an agreement with Mr. Prince to return it to him so that he could return it to the Maine Company.

Q. 98. Now, what was the result of this transaction as far as F. H. Prince & Company was concerned? *A.* Well, it wiped out any obligations we might—I mean, it wiped out any obligations that F. H. Prince & Company might have to the Maine Company.

Q. 99. And created an obligation of F. H. Prince, personally? *A.* It created an obligation of Mr. Prince, personally, to the Maine Company.

Q. 100. What effect did this transaction have on the financial statement of F. H. Prince & Company? *A.* Well, of course, it helped the financial statement of F. H. Prince & Company because it discharged the debt of $1,200,000, and it became a debt of Mr. Prince, personally.

Q. 101. Did it have any effect on the cash position of F. H. Prince & Company? *A.* No, because it was in and out.

Q. 102. Now, have you described all the transactions in

this year as between F. H. Prince & Company and the Maine Company which appear on S-65? A. Well, in December of 1927, F. H. Prince & Company borrowed $400,000 from the Maine Company. That is the only other transaction.

Q. 103. Did that loan have anything to do with the purchase of Jersey common or Maine bonds? A. No, no.

Q. 104. Was that loan secured? A. It was.

Q. 105. How? A. It was secured with bonds that were listed on the Boston Stock Exchange.

Q. 106. Now, from 1927 forward, Mr. Donovan, have there been other borrowings by F. H. Prince & Company from the Maine Company? A. Oh, yes, as shown in this stipulation.

Q. 107. S-65? A. S-65.

Q. 108. From that year on, has there always been collateral deposited against such borrowings? A. Yes, there has been.

Q. 109. You testified a few minutes ago that Mr. Prince borrowed $1,200,000 from the Maine Company in 1927, and that he deposited 15,000 shares of stock of the Maine Company as collateral for that loan and for securities which he borrowed; did you not? A. I did.

Q. 110. From 1927 on have there been other loans by the Maine Company to Mr. Prince as appears on S-65? A. Yes, there were other loans in 1932 and '33.

Q. 111. Now, have those loans at all times had collateral deposited to secure them? A. Yes.

Q. 112. Have you prepared from the books and records in your charge a schedule of the collateral deposited by F. H. Prince & Company and F. H. Prince from year to year beginning at the end of 1927 to December 31, 1933, showing the collateral deposited with the Maine Company by F. H. Prince & Company and F. H. Prince to secure loans made by the Maine Company? A. I have prepared such schedules.

Q. 113. And are those schedules with you or with me?

Mr. Welch: Have you seen these schedules, Mr. King, of the collateral?

Mr. King: No.

Mr. Welch: Then I should say as to these schedules which I am confident of their accuracy, they ought to go in under the provision that Mr. King may at any time check them, and, well, I don't just know quite what to say, because I know they are so accurate. You may check them and substitute other schedules if these are incorrect.

Mr. King: That is all right.

Mr. Clark: No objection.

Mr. Welch: I should like to mark these schedules of collateral beginning as of December 31, 1922, and ending as of December 31, 1933, as a single exhibit subject to the statement in respect of them which I have just made. Again they are loosely fastened and will be more securely fastened before the evidence closes.

The Member: State in the record how many pages.

Mr. Welch: Mr. Green is allergic to that idea.

Mr. Green: They consist of 12 pages.

The Clerk: Petitioner's Exhibit No. 24.

Mr. Welch: Is the exhibit that consists of 12 pages.

(The document, consisting of 12 pages, so offered and received in evidence, was marked "Petitioner's Exhibit 24," and made a part of this record.)

Q. 114. (By Mr. Welch): Have you in that schedule which has just been introduced in evidence placed values upon the collateral, Mr. Donovan? A. I have.

Q. 115. Upon what basis? A. I valued the collateral at the market value, bid price in each instance, at the end of whatever particular year was called for, and with the exceptions of Chicago Stock Yards Company or the Maine Company common stock, which I valued at its book value in

accordance with the figures that the balance sheet contains in the stipulation.

Q. 116. I take it, there have been no sales of stock of the Maine Company common at any time since Mr. Armour's stock was purchased in '22? *A.* No.

Q. 117. Now, let me ask you this: Has interest on the loans from the Maine Company to F. H. Prince & Company and F. H. Prince been paid from year to year? *A.* Yes.

Q. 118. And how often? *A.* It has been paid monthly by check.

Q. 119. And at what rate? *A.* Four percent.

Q. 120. Would you glance at S-68 for a moment and tell us the amounts of interest that have been paid by F. H. Prince and F. H. Prince & Company to the Maine Company on these loans from 1923 through December 31, 1933? *A.* $1,331,149.64.

Q. 121. Did the Maine Company have substantial sums of money on deposit in banks from 1930 to 1933? *A.* They did.

Q. 122. Can you tell us the rate of interest received by the Maine Company on its bank deposits through those years? *A.* In 1930, they received interest at the rate of 3 percent for the first six months, 2½ percent for the last 6 months; in 1931, the interest rate was 2½ percent for the first 6 months and 2 percent for the last 6 months; in 1932 the interest rate was 2 percent for the whole year, and in 1933 it was 1½ percent to July 1, when they stopped paying interest on ordinary commercial deposits.

Q. 123. Have the personal borrowings of Mr. Prince from the Maine Company in each instance, or every instance, been turned over to F. H. Prince & Company for use in its business? *A.* They have with the single exception of $160,000, which was borrowed in 1932 by Mr. Prince.

Q. 124. And what was that used for? *A.* That was used to purchase Mr. Prince's Newport house.

Q. 125. In Newport, R. I.? A. In Newport, R. I.

Mr. Welch: I have in the courtroom the originals of the notes from F. H. Prince and F. H. Prince & Company to the Maine Company or such of them, to be more accurate, as were outstanding at the end of 1933, and which were unpaid and are still unpaid, and I want to offer those notes, preferring, however, actually, to put in evidence photostats as against the originals, the photostats now being offered to Mr. Clark for comparison.

The Member: The comparison does not need to be made now.

Mr. Welch: I think you are quite right.

The Member: The originals are here.

The photostats can be offered, and if there is no objection on other grounds, they will be received, and verified at a more convenient time.

Is there any objection, Mr. Clark?

Mr. Clark: I would like to ask the purpose of this offer?

Mr. Welch: Well, we are naturally in this case, I take it—we are going to argue at some time about these loans, and I wish to show the notes supporting the loans, the fact that they are collateral in form, and that the note for $160,000 for the Newport house is in quite a different form than the others.

Mr. Clark: I have no objection.

The Member: They are received. Let the photostatic copies be received in evidence.

Mr. Welch: Mr. Green, would you be happier if they were marked one by one?

Mr. Green: I think so. They are then easy to keep track of.

Mr. Clark: Of course, Your Honor, we may have the opportunity to check.

Mr. Welch: Oh, indeed.

The Member: Unquestionably; you have the originals, I understand. They have been tendered to you.

Mr. Clark: That is true.

The Member: And copies are in evidence, and if there is any inaccuracy that you think the record should show, you will always have the opportunity to make that suggestion.

Mr. Welch: What is your next exhibit number?

The Clerk: Twenty-five.

Mr. Welch: I offer as Exhibit 25 a note of F. H. Prince to Chicago Stock Yards Company, dated November 14, 1927, or, to be more accurate, a photostat of the note; as Exhibit 26, a similar note dated January 19, 1933; as Exhibit 27, a similar note dated January 28, 1932.

I thought I had them in chronological order, but I don't think it matters. I will put the rest in chronological order.

As 28, a note of F. H. Prince & Company to Chicago Stock Yards Company, dated November 1, 1930;

As Exhibit 29, a note of F. H. Prince to Chicago Stock Yards, dated August 16, 1932;

As Exhibit 30, a note of F. H. Prince & Company to Chicago Stock Yards Company, dated August 22, 1932;

As Exhibit 31, a note of F. H. Prince & Company to Chicago Stock Yards Company, dated August 7, 1932;

As Exhibit 32, a note of F. H. Prince & Company to Chicago Stock Yards Company, dated August 30, 1933;

And as Exhibit 33, a note of F. H. Prince & Company to Chicago Stock Yards Company, dated October 31, 1933.

(The documents so offered and received in evidence were marked "Petitioner's Exhibits 25, 26, 27, 28, 29, 30, 31, 32, and 33," and made a part of this record.)

Q. 126. (By Mr. Welch). I ask you, Mr. Donovan, to look at the Exhibits 25 to 33, inclusive, and, particularly, at the signatures, and tell me whether they are all in the same handwriting. A. No, they are not.

Q. 127. Are there any of the notes that are in the handwriting of Mr. F. H. Prince, meaning by the handwriting the signatures? *A.* These two here are in the handwriting of Mr. Prince.

Q. 128. The numbers being what? *A.* Nos. 29 and 25.

Q. 129. And Exhibit 25 is the note of November 14, 1927, in the sum of $1,200,000? *A.* That is correct.

Q. 130. And Exhibit 29 is the note of August 16, 1932, in the sum of $160,000? *A.* That is correct.

Q. 131. Is the form on which the note, Exhibit 29, in the sum of $160,000, different from the other forms? *A.* Yes, it is.

Q. 132. The others being what form? *A.* Well, the others seem to be the ordinary and usual collateral note form.

Q. 133. And Exhibit 29 a simple note? *A.* A simple note form.

Q. 134. You have testified, I think, Mr. Donovan, that for some years F. H. Prince & Company was buying New Jersey common for the Maine Company as it would for any other customer? *A.* That is right.

Q. 135. During that period when it was buying and there were balances due from the Maine Company to F. H. Prince & Company, was interest charged by F. H. Prince & Company? Do you understand the question? *A.* No.

Q. 136. During the period of time when there were any balances due from the Maine Company to F. H. Prince & Company, was interest charged the Maine Company on the balances due? *A.* Oh, yes, always.

Q. 137. Did that situation of debit balances against the Maine Company and interest charges thereon continue down to 1927? *A.* Yes, it did.

Q. 138. Now, prior to the purchase for cash by the Maine Company, when F. H. Prince & Company bought Jersey common for the Maine Company, did it deliver the stock to

the Maine Company? A. No, it always kept it on the account.

Q. 139. And what did F. H. Prince & Company do with the shares not delivered to the Maine Company? A. Well, they used them to pledge on bank loans when they borrowed money.

Q. 140. Would they be used in conjunction with other collateral of other customers on bank loans? A. Oh, yes. They would pledge in an ordinary loan that of Jersey Company common and some stock that was owned by a customer and maybe some stock owned by F. H. Prince & Company.

Q. 141. Was that a regular custom of borrowing as brokers always do? A. Yes, the broker has the right to apothecate securities.

Q. 142. Now, have you prepared a schedule showing the amount of New Jersey Company common which F. H. Prince & Company had purchased for the account of the Maine Company which was pledged with banks upon different bank loans of F. H. Prince & Company from the year beginning with 1922 and continuing to 1933? A. I have.

Mr. Welch: This schedule, as others, I think, should be subject to check by Mr. King, or the Government attorneys, it being, as I understand, Mr. Clark, admitted in evidence such to Mr. King's right to check.

Mr. Clark: I have no objection.

The Clerk: Exhibit No. 34.

(The document so offered and received in evidence was marked "Petitioner's Exhibit 34," and made a part of this record.)

Q. 143. (By Mr. Welch). Will you take that in the event you want to use it (handing Exhibit 34 to the witness).

Have you included in the schedule which has just been marked in evidence the amount of the bank loans against

which the total amount of shares pledged were in fact pledged? A. I have.

Q. 144. And has the record been prepared from books and records which you have with you in the court room so that the Government may check? A. They have.

Q. 145. If they wish.

Was the money borrowed by F. H. Prince & Company represented by the bank loans, which is Exhibit— A. Thirty-four.

Q. 146. —borrowed from one bank or more than one bank? A. It was borrowed from many banks.

Q. 147. Was the collateral which appears on the schedule, Exhibit 34, all pledged at one bank or at different banks? A. No, it was pledged in practically every bank loan we had.

Q. 148. What collateral other than these Jersey shares appearing in Exhibit 34 was pledged on these different bank loans? A. Well, some collateral loans by F. H. Prince & Company and other collateral by customers—of course, prior to 1927, when we gave up our margin business, there was considerable collateral, considerable securities owned by customers on unpaid balances, and that was pledged as collateral on bank loans.

Q. 149. Now, will you tell us, Mr. Donovan, from the exhibits we have introduced, and the books and records, and the situation which you have before you, how these loans from the Maine Company to F. H. Prince and F. H. Prince & Company, with the exception of this $160,000 you have talked about, came about? A. Well, they came about in three ways: Due to the purchase long and continued purchases, I might say, of the New Jersey Company common and the Maine Company 5 percent bonds in the open market, in which F. H. Prince & Company had to borrow money to finance, and which they did borrow, and due to the purchase of Mr. J. Ogden Armour's interest in the Maine Company

and later due to the purchase by F. H. Prince & Company of the interest in the Armour & Company stock in 1933, which amounted to over a million dollars.

Mr. Welch: Will you pardon me a moment?

(Pause.)

Mr. Welch: Could I have that answer?

(Answer read.)

Q. 150. (By Mr. Welch). That is, as I understand it, in a general way the explanation of the source of those loans, Mr. Donovan? A. That is correct, Mr. Welch.

Q. 151. Now, in 1922, when the $2,300,000, $2,000,000 in bonds and $300,000 in cash was made by the Maine Company to F. H. Prince & Company, what was the effect of that situation as to F. H. Prince & Company's working capital? What was the result of the payment? A. Well, it didn't help F. H. Prince & Company's working capital at all, because, in fact, it hurt it in a certain sense, because the bonds and cash were delivered to Mr. Prince. It didn't help F. H. Prince & Company.

The Member: We will suspend until a quarter after two.

(Whereupon, at 12:45 o'clock p. m., a recess was taken until 2:15 o'clock p. m. of the same day.)

AFTERNOON SESSION.

The Division resumed hearings at 2:15 o'clock p. m.; whereupon, the following proceedings were had:

The Member: You may proceed.

Mr. Welch: If Your Honor please, I would like to continue for just a very few questions with Mr. Donovan before we interrupt, as I suggested we would.

Will you continue for a little bit, Mr. Donovan?

MR. JAMES F. DONOVAN

having heretofore been first duly sworn, was recalled to the stand, and was examined and testified as follows:

Direct Examination (Continued).

Mr. Clark: Wait just a moment. Are you going to finish with Mr. Donovan at this time?

Mr. Welch: I don't think so. I just want to run through a little bit more of the preliminary matter preliminary to Mr. Prince's taking the stand.

Mr. Prince is in the courtroom.

Mr. Clark: But Mr. Donovan will be back again?

Mr. Welch: Oh, indeed; yes. He will be back and offered for cross-examination.

Q. 152. (By Mr. Welch). Mr. Donovan, have you still S-67 before you? A. Is that S-67, Mr. Welch?

Q. 153. Have you been working from S-65 or S-67? A. S-65.

Q. 154. With that S-65, the exhibit from the stipulation, before you, would you take a moment to trace through it for us the transactions that have resulted in the loans from the Maine Company to F. H. Prince & Company and F. H. Prince? A. Yes, sir.

Q. 155. I think you might begin back in 1921, if you will. A. At the end of 1920, or January 1, 1921, the Maine Company owed F. H. Prince & Company $3,362,234.13, and F. H. Prince & Company owed to the Maine Company on notes $710,000.

Q. 156. $710,000? A. That is on January 1, 1921.

Q. 157. All right. A. Making a net balance due to the Maine Company of $2,652,234.13.

Q. 158. May I interrupt to ask you if that account receivable was one of the principal assets of F. H. Prince & Company at that time? A. That accounts receivable was the principal asset of F. H. Prince & Company, and it also was an interest-bearing account which, of course, meant income to F. H. Prince & Company.

Of course, as I have previously stated I should say at

this particular time that that account was financed by borrowing from banks by F. H. Prince & Company when the New Jersey Company common stock was pledged.

In 1922, or at least during 1921 and 1922, as I have previously testified, the Maine Company turned over to F. H. Prince & Company $2,000,000 Maine Company's 7 percent debenture bonds, and $300,000 in cash.

Of course, this didn't help F. H. Prince & Company's condition at all because it was immediately turned over to Mr. Prince for the purchase of the J. Ogden Armour interest in the Maine Company.

This, of course, as I say, didn't help Prince & Company because we couldn't pay off any loans with it and we lost the interest on that amount which was credited to the account.

From 1921 to 1927, or at least from 1922 until the early part of 1927, as will be observed from looking at this S-65, there were really no borrowings of any consequence from the Maine Company. There was one borrowing of $25,000 which was repaid in a short time.

However, the credits which the Maine Company was receiving in the form of interest on bonds, dividends on New Jersey Company common stock, was piling up until it was equal to over a million dollars, about $1,182,000, in 1927.

Q. 159. That is, I assume, because F. H. Prince & Company was collecting those dividends—

Mr. Clark: Wait a moment. That is a leading question.

Mr. Welch: Oh, well; you know this as well as I do, Mr. Clark. It is in the stipulation.

The Member: Nevertheless you had better observe the forms.

Mr. Welch: All right.

A. I stated the dividends were being collected by F. H. Prince & Company and credited to the account of the Maine Company—

Mr. Clark: May I ask him what the question is?

Mr. Welch: I asked him to trace these transactions—

Mr. Clark: I didn't understand it that way.

The Member: That question was stricken. We are getting back to the original narrative.

Mr. Welch: I will try to keep still and let the witness trace those transactions through.

Q. 160. (By Mr. Welch). Go ahead, Mr. Donovan. *A.* During this period from 1922—at least back in 1922 I should have mentioned that F. H. Prince & Company owed to the Maine Company approximately 17,000 shares of New Jersey Company common stock which was pledged on bank loans, and I previously stated, when the bonds and money was received from the Maine Company and turned over to Mr. Prince, that didn't give us any chance to pay any bank loans or release that stock, so they were still outstanding, as far as we were concerned.

During the years 1922 to 1927, in spite of the fact that the loans didn't increase to any extent, F. H. Prince & Company delivered to the Maine Company approximately 6,000 shares of stock by releasing it from the bank loans.

Q. 161. And by "stock," you mean what stock? *A.* Six thousand shares of the New Jersey Company common stock.

Q. 162. Go ahead, sir. *A.* In 1927 Mr. Prince personally borrowed the $1,200,000 and various collateral which I previously spoke about, and this money was used to discharge the debt to the Maine Company consisting of notes and accounts payable in the amount of $1,182,318.38. Then, of course, in December of 1927, as I have previously testified, there was $400,000 borrowed by F. H. Prince & Company for its own purpose and secured by securities other than New Jersey Company common or Maine Company 5 percent bonds.

At the end of 1927 there was still outstanding—that is, as

I mentioned once before—Mr. Prince, when he borrowed the $1,200,000 from the Maine Company he said he would personally return the 11,000 shares of New Jersey Company common stock which was then pledged on F. H. Prince & Company loan so it would become necessary for F. H. Prince & Company to pay those loans off to release the stock so Mr. Prince could live up to his obligation, so during the period from 1927 until 1933 it will be observed in S-65 various borrowings were made by F. H. Prince & Company from the Maine Company, these borrowings being used mainly to pay off bank loans and releasing 9,000 additional shares of New Jersey Company common to Mr. Prince, who in turn returned it to the Maine Company.

That left a balance of about 2,000 shares which would be owing to the Maine Company by Mr. Prince and F. H. Prince & Company owed to Mr. Prince.

Since 1922, when that transaction occurred in which I mentioned that Mr. Prince bought the Armour & Company stock—at least bought the J. Ogden Armour stock of the Maine Company, F. H. Prince & Company was, if you will, were playing a losing game, so to speak. The principal asset was gone. That is, the 2½ million debit balance was gone.

The interest on that account that previously had been charged was no longer being charged because there was no longer any debit balance there, so F. H. Prince & Company had lost the current rate of interest on that account from 1922 to 1923, and, in fact, after that date.

Another thing I might mention regarding that 2½ million dollars, not only did they lose the interest on it, but, of course, they had borrowed that money from banks originally to finance these purchases and they still owed the money to the banks with interest, so they were losing it as a receipt but they still had to pay it to the banks as the loans were still outstanding.

During this time F. H. Prince & Company up to 1933 frequently borrowed money from the Maine Company and, incidentally, there were frequent payments of those loans, too, during that period.

There were borrowings and also returns but the money, as I say, was used to release stock of the New Jersey common loans and was also used sometimes to finance F. H. Prince & Company current operations.

Another reason that these bonds were used to release securities that customers had, because, as I mentioned once before, in 1927 the margin accounts, upon Mr. Prince's instruction, had been stopped but there were still securities out on bank loans which belonged to customers and we had to release those securities so that would entail paying up those bank loans to get the stocks out to deliver to customers.

Going back to 1930 for a moment, you will observe in S-65 that Mr. Prince personally returned to the Maine Company $650,000 reducing his loan of $1,200,000 to $550,000.

During that same year F. H. Prince & Company borrowed $475,000 but they repaid $400,000, leaving a net borrowing of F. H. Prince & Company of $75,000, but the net condition for the year, as far as the Maine Company was concerned, was they had received $650,000, a loan of $75,000, so it was a net gain of $575,000.

In 1932, it was decided to use F. H. Prince & Company as the vehicle or means to buy into the Armour Company.

As the result of this Mr. Prince felt that the F. H. Prince & Company's financial statement, in so far as the New York Stock Exchange questionnaire, which had to be filed every six months, had to be strengthened, so he decided and did borrow, in 1932, $450,000 from the Maine Company and he turned over these funds to F. H. Prince & Company which, of course, debited cash and credited Mr. Prince's capital ac-

count, thereby making a much stronger looking financial statement of F. H. Prince & Company.

In 1933, Mr. Prince did practically the same thing. He borrowed personally $440,000 in the Maine Company, and he turned over these funds to F. H. Prince & Company to strengthen the New York Stock Exchange questionnaire. Of course this was done for the purpose of making that questionnaire stronger in case anybody should see it. Also, in 1933, F. H. Prince & Company borrowed from the Maine Company $1,000,000. This $1,000,000 was used to finance the purchase of Armour & Company stock in the amount of $1,067,389.50.

Q. 163. And that purchase was made in '33? *A.* That purchase was made in 1933.

Q. 164. Well, did that purchase represent anything like control of Armour & Company? *A.* Oh, no.

Q. 165. Well— *A.* It was a large block of stock but it was far from being a control.

Q. 166. Well, now, at some time after the purchase was Mr. Prince elected chairman or to some office? *A.* Yes, he was.

Q. 167. In Armour & Company? *A.* Yes.

Q. 168. What office? *A.* He was elected to the chairmanship of the board of Armour & Company.

Q. 169. Did F. H. Prince & Company do anything to bring about that election in addition to buying this block of stock that you mentioned? *A.* Well, of course, they did in this way: The New York Stock Exchange questionnaire was strengthened. Of course, Mr. Prince did that through F. H. Prince & Company, and also solicited proxies from brokers who were members of the same exchanges that they were, namely, the New York and Boston and Chicago Stock Exchanges.

Q. 170. Did the strengthening of their statement have any-

thing to do with their ability to secure the proxies? A. Yes, it did.

Q. 171. I think we all understand this, but you have spoken of these borrowings in '32 and '33 of sums from the Maine Company which were contributed to the capital of F. H. Prince & Company. A. That is right.

Q. 172. Since we all know F. H. Prince & Company was owned entirely by F. H. Prince as an individual, how did those borrowings strengthen F. H. Prince & Company? A. Well, of course, as far as the New York Stock Exchange was concerned, and this was done for the New York Stock Exchange questionnaire, Mr. Prince, as an individual, and F. H. Prince & Company is an entirely different person, and, of course, when Mr. Prince made borrowings individually with a bank or anybody else, as a matter of fact, they wouldn't appear on this questionnaire for the Stock Exchange.

Q. 173. Now, I think you have already told us that the bank loans on which the Jersey common was collateral bore interest, the bank loans of F. H. Prince & Company? A. Yes, sir; they did.

Q. 174. At what rate did they bear interest from 1922 through 1933? A. Well, with the exception of a short time in 1924, we always paid interest ranging from 4 percent to 6½ percent.

Q. 175. Will you tell us again for how long a period you observed the relations of F. H. Prince & Company and the Maine Company? A. From 1920 to 19— well, to the present time.

Q. 176. Have you observed during that period whether or not F. H. Prince & Company has been of any service to the Maine Company? A. Oh, yes, always been of considerable service to the Maine Company.

Q. 177. To what way or to what extent? A. Well, the

purchases of this New Jersey Company common stock, which the Maine Company was quite anxious to get by soliciting the stockholders. And it is common knowledge in Boston, New York, and Chicago that if anybody wants to sell Chicago Junction, at least—New Jersey Company common, they contact F. H. Prince & Company, and they will find a ready market for it. And also, if they heard of people dying or there being an estate, they were probably—probably there was some action taken on it to visit the estate to let them know there was a ready market, because the stock wasn't listed—at least, it was listed but with a very narrow market, and the estate would know that they could get cash for it immediately from F. H. Prince & Company.

Mr. Clark: Do you really know anything about what you are stating now?

The Witness: I do, sir.

Mr. Clark: And from what source?

The Witness: You mean as to purchasing the stock?

Mr. Clark: Yes.

The Witness: Well, as Mr. McDonough's assistant in the office, I frequently purchased it.

Mr. Clark: I see. You actually did it yourself?

The Witness: For the Chicago Stock Yards Company as a customer of F. H. Prince & Company; yes, sir.

Q. 178. (By Mr. Welch). From your observation, Mr. Donovan, so far as you have observed it, has there been any substantial reason why F. H. Prince & Company should have been kept in business, say, for the last 10 years except for what it has done on behalf of the Maine Company?

Mr. Clark: Oh, now, I object.

Mr. Welch: From his observation.

The Member: Well, that involves a great deal of reasoning on his part. I think the objection is well taken, and it is sustained.

Q. 179. (By Mr. Welch). From your knowledge of F. H. Prince & Company's transactions, can you tell us whether or not F. H. Prince & Company has been—whether or not the operations of that company have been resulting in a gain or a loss during the last, say, 10 years? *A.* They resulted in a loss.

Q. 180. Will you tell us in approximately what amount per year? *A.* Well, it resulted in a loss from fifty to seventy-five thousand dollars in, you might say, operations, and, besides this, there were losses from the sales of securities. Most years there was a loss rather than a gain from sales of securities.

Q. 181. But the fifty to seventy-five thousand, through your observation, is from operations alone? *A.* Operations; that is right, sir.

Mr. Welch: Now, I think I would like to suspend, if I may, Mr. Clark, at this point and put on Mr. Prince.

Mr. Clark: Yes, if it is understood, as I understand it is, that we may, before cross-examination, have an opportunity to go over these books.

Mr. Welch: Yes. Well, I guess so.

I will turn them over to you for cross-examination at the first opening.

Mr. Clark: I don't want to take him for cross at this time.

Mr. Welch: You won't have a chance. I have a notion Mr. Prince will run through the rest of the day.

Mr. Clark: Do you think so?

Mr. Welch: He is going to take the stand now.

Mr. Clark: Well, that will be all right, then.

The Member: You may stand aside However, hold yourself in readiness to be called at any moment.

The Witness: Thank you, Your Honor.

(Witness temporarily excused.)

Mr. Welch: Mr. Prince, will you take the stand, sir?

If Your Honor please, and Mr. Clark as well, could I say this word? Mr. Prince is 79 years of age. The case has been postponed twice because of his health. He is testifying now with the doctor in the courtroom, purely as a precautionary matter, not that we anticipate that he will be needed, but I did want to say to Your Honor that because of these facts I am going to compress my direct more than I would if he were 20 years younger, and in so far as it is consistent with your duty, Mr. Clark, I would appreciate it if you would compress his cross. I don't at all wish to ask you to compress it beyond any reasonable length to which you feel you must go.

Mr. Clark: I will quite conform to your suggestion. I have no idea of furthering cross any further than necessary.

Mr. Welch: Thank you, sir.

MR. FREDERICK H. PRINCE

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Welch). What is your full name, Mr. Prince? *A.* Frederick Henry Prince.

Q. 2. You live where, Mr. Prince? *A.* Well, I live mostly on a railroad train. No. My home is at Newport, R. I.

Q. 3. You are, I take it, the president of the Maine Company? *A.* I believe so, sir.

Q. 4. Whose case is being tried here.

I want to take you directly to the testimony that we are interested in and ask you, if I may, when you first became interested in any way in the Chicago Stock Yards. *A.* Well, in 1882, I think it was, Mr. Nat Thayer was a family friend, gave me a letter to Mr. Sherman, and I went out to the Chicago Stock Yards, bought a few shares of stock, and from

then on I went continually, quite often, because I became interested in the property and in the men that were there.

Q. 5. Now, I think you had something to do with the formation of the Jersey Company in 1890; did you not? *A.* I knew that Mr. Thayer was being held up by the three packers. They had bought land at Tolliston, which is now the Gary United States Steel property, and we had several visits and talks in Chicago, and, finally, I suggested to him that I thought I could get up a company to buy out the old owners and we could settle with the packers who were threatening to move.

Q. 6. As a consequence of that, was the Jersey Company formed in 1890? *A.* And the consequence of that was I made two or three trips to Europe, took Mr. Newell over, and we formed the New Jersey Company in conjunction with a syndicate that I got up over in England, and that is the reason the Jersey Company was formed, in order to come to satisfactory arrangements with the packers.

Q. 7. Now, I think I will go right along, if I may, and ask you if at some time you were interested in the formation of the Maine Company, the present Maine Company. *A.* The contract that we made with the packers whereby we paid three millions of dollars was made for 15 years. I tried to make it twenty-five but without success, and when that time expired and negotiations were begun again, I happened to know that one of the packers, Morris, was asking for a bigger division than the original agreement, and I then persuaded Mr. Armour to lead the syndicate and to come in and buy up with me the common stock of the New Jersey Company.

Q. 8. And did he become interested with you in the Maine Company? *A.* He did, sir.

Q. 9. And after the Maine Company was formed did Ar

mour & Company continue right on doing business at the yards? A. They did.

Q. 10. And did all the other packers? A. They did.

Q. 11. Could I go back for a moment, Mr. Prince, and ask you who were some of your fellow directors in the Jersey Company? A. Well, it so happened that when the offering was made to the public, through Blake Brothers Company, the English people were very anxious to have some very strong names that were well known, because it so happened there came about an important financial panic at that time in South America, and so Mr. Chauncey DePew was president—in fact, I have got the list here. I have to look it over.

Chauncey DePew of New York was president; John Quincy Adams of Boston, vice president; Edward J. Phelps of Burlington, late U. S. Minister to England, was a director; Mr. Sewell, a director, former Senator from New Jersey; John Hoey, president, Adams Express Company; Frederick H. Winston of Chicago, High E. Childers of London, late Chancellor of the Exchequer; Francis Barron Blake of Blake, Boissevain & Company, London bankers; Bernard T. Bosenquet, Director of Lloyds Bank, Ltd., of London, Adolph von Adre, Andre, Mendel & Company, Bankers in London and Amsterdam.

Q. 12. Do you feel quite all right, Mr. Prince? A. Yes, all right. I am all right now.

Q. 13. Did you begin any program of buying New Jersey common after the Maine Company was formed? A. Oh, I continually bought, you understand, all the time. I consulted Mr. Armour from time to time, and I went on buying, buying, buying, whenever the opportunity occurred.

Q. 14. Do you remember, Mr. Prince—you may not—but about how much you bought in the first 10 years, say? A. I don't think I could. I had public accountants who looked after my books, and I am afraid they knew more than I do.

They have been on the stand to tell you. They can really tell you. All I can tell you was the principle, and what our purpose was.

Q. 15. Yes. *A.* I can tell you what my purpose was, if you would like to know.

Q. 16. I understand, but I think you have said enough about that at the moment.

Do you remember that F. H. Prince & Company furnished funds to buy that common in the early part— *A.* I beg your pardon?

Q. 17. Do you remember that F. H. Prince & Company, your concern, furnished funds to buy Jersey Company before the Maine Company went— *A.* We used our credit, you understand, to buy that stock, you understand, and bought wherever it was offered.

Q. 18. Do you remember, Mr. Prince, how long a period of time you were able to get a charter for the New Jersey? *A.* No, that was a legal matter. I can't tell you. That was a legal matter. Mr. Guthrie was our lawyer, representing the English people.

Q. 19. Do you remember when the charter expires of the Jersey Company? *A.* Oh, yes. The charter expires next year.

Q. 20. 39— *A.* '40.

Q. 21. Now, Mr. Prince, after the Maine Company was formed, did you make some plan about what you wanted to do with the Jersey Company in 1940? *A.* Yes. Mr. Armour and I talked the matter over, and we realized that in 1940, that it would be advisable to liquidate the Jersey Company for two reasons.

In the first place, when the New Jersey Company was formed, there was no means of raising any new capital. It was a difficult—you couldn't increase your stock, and so it

was a difficult thing for the necessities of the yard to raise any new capital.

In the second place, there was a very large saving to be made in liquidating the New Jersey Company. And then I called Mr. Armour's attention to that, and he joined me, and I bought up all the stock of the New Jersey Company, that I could, every single share.

Q. 22. Now, let me move ahead, if I may, Mr. Prince.

Did the time come when you had—strike that out.

Did the time come when something had to be done about buying Mr. Armour's interest in the Maine Company? A. Why, in the trial that the packers were in, it was finally settled by what we call the packers' decree, and in the packers' decree, they agreed to dispose of—a great deal of outside interests, and among others they agreed to dispose of all their stock yards' interests. So Mr. Armour was obliged to sell his Maine Company stock.

Q. 23. I want to shorten this all I can, and I want to show you— A. I am all right.

Q. 24. —to show you a paper that you have not seen in many years and just ask you if you will identify your signature and the signature of Mr. Armour at the bottom of it. A. I will.

Q. 25. And on the second page that you have before you, is that your signature and his? A. It is.

Mr. Clark: Is this something which is already in evidence?

Mr. Welch: No, I am going to offer it now, and I would rather not delay—

The Witness: Can I read it?

Mr. Welch: It is the letter by which—

The Witness: I didn't know what it was. I thought I would like to read it.

Mr. Welch: I just thought perhaps we would shorten your time on the stand if we didn't.

The Witness: Well, I don't know.

Mr. Welch: All right.

Mr. Prince, it is an agreement for your buying his stock, Mr. Armour's stock.

The Witness: Well, I am sorry, sir, but I don't remember.

Mr. Welch: I don't know what to do with it properly except to offer it and have it marked. I think we will take the necessary time.

Mr. Clark: I have no objection.

Mr. Welch: What is your next number?

The Clerk: Thirty-five.

Mr. Welch: Thirty-five is the letter of November 1st, 1920, from F. H. Prince to J. Ogden Armour.

Thirty-six is the letter of November 1st from F. H. Prince to J. Ogden Armour.

Q. 26. (By Mr. Welch). Mr. Prince, when you get around to buying out Mr. Armour, do you remember anything about efforts that were made to have the Mainé Company, itself, buy him out? *A.* Why, if I think—yes, as I remember it, there were two occasions. I think they asked Washington—who they asked I don't know, but they objected, I think, to the Maine Company buying them out. Also when the packers were going to sell me all their other interests in the different yards, they wanted me to buy it, and I agreed, and I think—I don't know whether it was the court or who it was, they objected, I guess it was.

(The documents so offered and received in evidence were marked "Petitioner's Exhibits 35 and 36," and made a part of this record.)

Q. 27. (By Mr. Welch). Do you remember the sum that was paid Mr. Armour? *A.* I beg your pardon?

Q. 28. Do you remember the sum that was paid Mr. Ar-

nour? A. Well, I think it was about three millions, if I remember correctly.

Q. 29. Now, I want to turn to quite a different thing. Do you remember there was difficulty in the banks in Chicago, in 1932? A. I didn't know it was confined to Chicago, sir.

Q. 30. Do you remember that your companies did something about a bank that is now the Live Stock National Bank? A. Yes, I remember that distinctly.

Q. 31. Did money of the Maine Company and of the operating companies go into that bank? A. They did, sir.

Q. 32. Why were you interested, Mr. Prince, in taking care of the bank at the stock-yards at that time? A. Because Mr. Leonard and Mr. Reimers thought it would be a great detriment to the stock yard industry if that bank, with all the connections it had, was allowed to fail.

Q. 33. Mr. Prince, it is in evidence here, and I won't trouble you with the years, that in the early years, before you got your New York Central lease, your dividend policy was somewhat irregular. Do you remember that? A. Yes, I do, sir.

Q. 34. And after the New York Central lease was made, which was, I think, 1922, you settled down to a dividend of $400,000 a year? A. Yes, sir.

Q. 35. Will you tell His Honor the reasons that led you to fix that sum as the dividend of the company? A. I thought with the large sum we had to pay in 1939 and 1940 we should only pursue a conservative policy.

I had had a great deal of experience in financing. In fact, I was very fortunate in being associated and knowing both in New York and Chicago and Boston probably the leading men that were active in finance and I thought ever since we went off the gold basis that we were in a very doubtful period; in fact, a very anxious period, and I don't know that we are out of it today, but I have had, I think I had,

especially in the younger days, because I have owned stock in a great many railroads, I have had large obligations but I have always met them promptly.

Q. 36. Mr. Prince, I was thinking more about going back to 1924 when you fixed this $400,000 a year. Did the rate of return on your capital stock have anything to do with it? *A.* I thought it was a conservative rate, you understand. I didn't care about paying any more than that, you understand, with the large obligations we had ahead of us.

Q. 37. Were you, in the years 1930 to 1933, in any way anxious about the New York Central lease? *A.* Why, yes and no. I knew one thing: I had spent 3 years with the New York Central officials in making that lease. I think if was a year and a half before I ever named a price on it.

I insisted that they go out and examine the property and the books before I named any price and then, later on, the New York Central was so afraid I wouldn't live up to my contract that the president made a personal contract and deposited a hundred thousand dollars to carry it out. They saw what a great advantage it was to the New York Central to have that great terminal property in Chicago.

I think it paid them—of course they couldn't add anything to the property because the business we were building up there was there, but I think it has paid them about, over the lease, without the expenditure of one cent, it has paid them $14,000,000.

Therefore, as far as that is concerned, even if the New York Central went into the hands of a receiver that that lease would hold and would stand good.

In fact, I offered to break the lease because there was another railroad wanted to come in, and I offered to alter the lease as I had made it. They all recognized the value of that lease, and, therefore, while 40 percent of all our railroads are in the hands of the receiver and nobody knows—

probably the coal roads and one or two other roads are the only ones that may weather the storm.

In fact, at the time I thought a hundred-year lease payable in gold was perhaps the best contract that could be made.

Q. 38. And you mean by that, at the time the lease was made? *A.* At the time the lease was made, yes.

Q. 39. Did you have any anxiety at all in 1932 and 1933 that the New York Central might go into receivership? *A.* I thought it possible for any railroad. If it hadn't been for the R.F.C. loaning five billions of money, why, practically all the railroads excepting possibly a few coal roads would be in the hands of a receiver.

Q. 40. Mr. Prince, it has been testified to here that on one occasion you borrowed $160,000 from the Maine Company to buy a house in Newport. Will you tell us about that? *A.* That was for Mrs. Prince.

Mrs. Prince had lived in Newport and she thought the climate on the North Shore was a little too vigorous for winter and she wanted to go back, and so until the property on the North Shore was sold, why, I practically loaned her the money although she had her own fortune which she had inherited from her father in trust, but I considered there was no question about it being good; I was prepared to pay it, anyhow.

Q. 41. When you speak of this house on the North Shore, has it a name, sir? *A.* Somebody named it Princemere.

Q. 42. And is its value, in your opinion, somewhat more than $160,000? *A.* Oh, yes.

My dear sir, if you can tell me what any property is worth today—I have a ranch out in Wyoming and I don't think anybody could tell what property is worth today.

Q. 43. Mr. Prince, has it been your policy to pull money in

from the operating companies steadily to the Maine Company all through the years? A. Yes, sir.

Q. 44. All you could, sir? A. Yes, sir.

Q. 45. Have you ever succeeded in accumulating funds in the Maine Company beyond its reasonable needs?

Mr. Clark: To that I object, Your Honor. That involves a conclusion of fact.

The Member: I will sustain the objection. The objection is to the form of the question.

Mr. Welch: Is to the form?

The Member: Is to the form of the question.

Q. 46. (By Mr. Welch). In your opinion, Mr. Prince, have you ever—strike it out, will you, please?

In your opinion, Mr. Prince, has the Maine Company ever accumulated funds beyond its own reasonable needs for those funds?

Mr. Clark: Well, now, to that I am also going to object, Your Honor, because I think it involves the same conclusion, although phrased differently.

The Member: I think that probably does not make the question objectionable. It may affect the weight of the answer.

You may have to take into consideration the interest of the witness in making the answer, making his statement, but I think that does not make it inadmissible.

I will overrule the objection.

Mr. Clark: And an exception noted, please.

Mr. Welch: Would you read that question to Mr. Prince, Mr. Reporter, so that he can hear it?

(Last question read.)

A. I would say, to be conservative, never.

Q. 47. (By Mr. Welch). Mr. Prince, did you ever have in mind using the Maine Company for the purpose of preventing an imposition of a surtax on you as a shareholder?

Mr. Clark: Just a moment.

(Counsel confer.)

Mr. Clark: No objection.

The Member: You may answer the question.

Perhaps you had better read it to him, Mr. Reporter.

The Witness: I will gladly tell you anything I know.

The Member: Listen carefully to the question, Mr. Prince, and see if you can answer it, as put.

The Witness: Will you read it again?

(Last question read.)

A. Never, sir.

Q. 48: (By Mr. Welch): Mr. Prince, I have just got one other question to ask you: Will you tell us what your purpose was in accumulating funds in the Maine Company, as you have done? A. Why, sir, I recognized, as a man that had many years experience in finance, the obligations that I had before me to pay in 1939 and 1940. I kept that continually before me. I recognized the responsibility that I had, that in carrying on that industry and the association I had with the men who had been with me all my life, to see that nothing happened to it. I used the best judgment I could to be conservative. Through all the troubles that we have had and the uncertainty, I tried to hold my ship to its course. Whether I have done so, or not—

Mr. Welch: You may inquire, sir.

Mr. Clark: Ask Mr. Prince if he would like to rest a moment.

Mr. Welch: Thank you.

Would you like to rest a moment, Mr. Prince?

I would like to get him off the stand. Is that agreeable?

The Member: Either way is agreeable. I don't want the witness to be unduly stressed physically, but if he wants to go on, let us go on.

Mr. Clark: Would you care to go on, Mr. Prince?

The Witness: Oh, yes. I would be glad to, sir.

Cross-Examination.

X-Q. 49. (By Mr. Clark). You stated, sir, your purpose in the conduct in the activities of the Maine Company; your conduct in the activities of the Maine Company and your purpose. A. Yes. I devoted all of my time from the time the Maine Company was formed to the development of the plans I had to build the railroad up and the Central Manufacturing lands.

X-Q. 50. And you developed that entire situation? A. I think I did, sir.

When I bought the lands I had to buy it from my personal funds before I could get the company to take it over.

X-Q. 51. And you had to handle all the activities of the Maine Company, didn't you, sir? A. I think I did, sir, but I had men who had been with me for a great many years out there.

X-Q. 52. Yes.

You have spoken about your concern as to the 1940 liability. What do you mean by that?

A. Well, there would be practically $28,000,000 would have to be raised, in 1940.

X-Q. 53. For what reason? A. Why, to pay off the $14,000,000 bonds that were due; to pay six million and a half of preferred stock; to pay three millions of bonds on the Central Manufacturing and to pay our guarantee on the Elevated bonds, I think it was $2,600,000, if I remember rightly.

X-Q. 54. Now, in your conduct of the activities of the Maine Company, did it occur to you that it would be advisable to purchase any of the outstanding bonds of the New Jersey Company? A. Outstanding bonds of the New Jersey Company?

X-Q. 55. Yes. A. If anything came cheap, we bought everything there was that came along.

X-Q. 56. Well, you were buying stock of the New Jersey Company. A. Yes.

X-Q. 57. Throughout. A. Yes.

X-Q. 58. And had done so for many years. A. That is right.

X-Q. 59. Now, why, if you were concerned, as I understand you were, as to the situation of New Jersey Company in 1940, why didn't you buy the bonds in? A. Because the bonds were very closely held. I think Mr. Rockefeller had three million.

X-Q. 60. Well, there were fourteen million, weren't there? A. There were fourteen million but the bonds were very closely held, you understand.

X-Q. 61. And you mean you couldn't buy them? A. No. They were held mostly by trustees; even the stocks were held by trustees, and women, all over the country.

X-Q. 62. Were there any difference between the stock and bonds? A. Yes. We bought bonds or stock whenever there was an opportunity.

X-Q. 63. Yes, but was there any difference in the type of holdings of the stock and the bonds? A. Why, no. I considered both were equally good. It was only a question of price.

X-Q. 64. Was your concern relative to the year 1940, as to financial relationship, due to the expiration of the charter of New Jersey Company? A. Why, yes, the charter was expiring and the organization, as I said before, gave no leeway of obtaining new capital that might be required, and, also, there was a large saving to be made in reorganizing the company.

X-Q. 65. You would have expected to reorganize, wouldn't you? A. I wouldn't have reorganized, you understand; I expected to liquidate the company. That is what Mr. Armour and I decided on.

X-Q. 66. Why were you concerned relative to the bonds?

A. Because the bonds had to be paid.

I will tell you, with regard to that: When the ten million issue came down it appeared to be an unfortunate financial time at that time and several of the New York bank syndicates were going to bid and I knew they were going to bid through the First National in Chicago.

Well, the man at the head of their bond department was a very hard trader and I was very much frightened he would put a low price on my bonds, so finally I persuaded the president of the company to withdraw, and I think, as a matter of fact, I got five points or six points more from Lee Higginson Company than I would have from him.

Mr. Clark: I think there is nothing further, Your Honor.

Mr. Welch: That is all, Mr. Prince.

The Member: Mr. Prince, let me ask you one question, if you will, please, sir, and that is I would like to have a little more specific explanation in this record about the failure to liquidate whenever it was possible to do so these outstanding fourteen millions of bonds. It is carrying along the question that is in the mind of Government's Counsel.

If you were concerned, as it is said that you were, about the fact that in 1940 you would have to liquidate the New Jersey Corporation and that that liquidation would involve these very substantial sums of which this $14,000,000 bonded indebtedness was one, can you tell me why it would not have been wise and the part of good policy on your part to liquidate those bonds by buying them as rapidly as you could before 1940 arrived so that when 1940 did arrive there would be a minimum amount of liquidating to do on those bonds?

The Witness: The reason of that, sir, is I shouldn't suppose there were—I am just giving a rough idea—I shouldn't

suppose there were twenty-five or thirty thousand bonds sold in a year. They had all been so closely held, you see.

The Member: Did you attempt to purchase those bonds?

The Witness: My office had orders that whenever they came along to buy them in, but there were none. I don't suppose there were twenty-five thousand sold in a year.

The Member: But you didn't try to stimulate a market at all so that you could buy them or so that they would be offered for sale?

The Witness: There was one thing and that was this: I wanted to buy all the securities; if I bid up one price on one, why, the ones I could buy would cost me more, and, of course, as a matter of fact, I have been through so many panics and have seen so many of my associates fail that all I can say is that I think I pursued a very wise policy and did the best I possibly could, you understand, recognizing the responsibilities I had on my shoulders.

Those bonds were very closely held, as I say, and as a matter of fact if I had bid up the price on those, something else I bought I would have to pay equally more for, but whenever those securities came along we bought them.

The Member: Essentially, then, the reason you didn't buy them was the reason they were not offered? That is, on the market?

The Witness: That is right, sir.

The Member: Whenever they were offered on the market at what you regarded as a satisfactory price—

The Witness: Whenever there was a panic, you understand, we would grab them when they were at a satisfactory price.

Mr. Clark: Just how many bonds did you buy?

The Witness: I can't tell you exactly how many bonds we buy, but all I can say is whenever the bonds—we never sold any. Everything we bought we bought when we could but

if I put up one bond ten points it had the effect of putting up everything else.

For example, when I bought the stock, the stock was selling at about 130 in the market and I offered 160 to everybody, you understand, and made a deposit with the American Trust Company to pay everybody for their stock.

Mr. Clark: Do you have any recollection as to how many bonds you bought?

The Witness: No, sir; I couldn't tell you that.

Mr. Clark: You have no recollection at all?

The Witness: I couldn't tell you, sir. I only know as any one of the securities—we were looked upon as a market for those things and we would have bought that would have come along that was offered by the brokers, but the policy was not to bid up anything because it affected the whole market, but we bought everything we could.

I should say I never saw a lot more than 5,000 offered, you understand; practically, they were so placed away that there were none for sale.

Mr. Clark: Are you sure that you ever bought any?

Mr. Prince: I would have to ask my office, sir, but I tell you anything that would have been offered was bought. I couldn't tell you that.

Of course, we were buying all the Maine bonds up, too, at the time, you understand; everything that came along. The result was we bought all the Maine bonds up except $2,600,000.

X-Q. 67. (By Mr. Clark.) Shifting to another point, Mr. Prince, do you recall that in 1905 what is referred to as the Railroad or Elevated Company, issued some first mortgage 4's in bonds in the amount of $2,327,000, approximately?

A. Yes. The reason for that was this, sir: We had to elevate the tracks and we made an arrangement with the Elevated Railroad that they would pay us a rental to the extent

the cost of our elevating the tracks, but, unfortunately, there was some mistake there, and it cost us about $650,000 more.

Mr. Clark: Now, of course, Your Honor, I move that other than what is responsive be stricken, in that answer.

The Witness: I beg your pardon?

Mr. Clark: It is only the first part of the answer which is responsive, that there were such bonds issued, to his recollection.

The Member: I will disregard the rest of the answer.

The Witness: I was trying to explain to you, sir, why I issued them.

Mr. Clark: That is all right, sir. The point of my question runs otherwise.

X-Q. 68. Do you recall when those were due? *A.* No. I think they are callable at 105.

X-Q. 69. I don't mean the amount. Do you recall the year in which they were due? Was it 1945? *A.* I should think that was about the time, sir.

X-Q. 70. That is after the expiration of the charter of New Jersey Company, isn't it? *A.* Yes, but we have the right to call those bonds.

X-Q. 71. I see. *A.* What is that?

X-Q. 72. I see; and on what terms and where? *A.* 105, I think it is. That is provided for in the $28,000,000.

Mr. Clark: I think there is nothing further.

Mr. Welch: You are finished, Mr. Prince, and we are very much obliged to you. (Witness excused.)

Mr. Welch: Could we have a short recess, if Your Honor please?

The Member: Yes, we will suspend for a few minutes.

(There was a short recess taken.)

MR. JAMES F. DONOVAN

having heretofore been first duly sworn, was recalled to the stand, and was examined and testified as follows:

Direct Examination (Continued).

Q. 182. (By Mr. Welch). Mr. Donovan, I show you a photostat and ask you if this is a photostat of a record of a meeting of the board of directors of the Maine Company?

A. It is.

(A document was handed to Mr. Clark by Mr. Welch.)

Mr. Welch: I will have this marked as Exhibit 37, a copy of minutes of a meeting of the board of directors of the Maine Company, November 22, 1911.

Mr. Clark: For the record, there is no objection.

(The document so offered and received in evidence was marked "Petitioner's Exhibit 37," and made a part of this record.)

Mr. Welch: And I am reading only a portion of the exhibit at this moment, and by "the exhibit" I mean Exhibit No. 37. It is a special meeting of the board of directors of the Chicago Stock Yards Company, the Maine Company, the taxpayer.

"Voted that the treasurer be and hereby is authorized to invest the funds of the company in Stock Exchange securities, in shares and securities of the Chicago Junction Railways and Union Stock Yards Company, the Union Stock Yards and Transit Company; and the Chicago Junction Railway in any securities authorized by law for National banks or for Massachusetts Savings Banks or proper for trustees in Massachusetts, and to loan the same with Stock Exchange securities as collateral, or on the same terms and conditions as permitted to national banks or to Massachusetts savings banks."

You may examine.

Cross-Examination.

X-Q. 183. (By Mr. Pierson). Mr. Donovan, I show you what has been introduced in evidence as Petitioner's Ex-

hibit 34, and I will ask you again to state what that is for the record. A. That is the summary of the schedule of bank loans of F. H. Prince & Company. I should say it this way: This is the summary from 1922 to 1933 of bank loans of F. H. Prince & Company upon which New Jersey common stock was pledged as collateral and the amount of such stock pledged upon such loans as collateral at such times.

X-Q. 184. Now, if I understand you correctly, that is the collateral that has been placed by F. H. Prince & Company with the banks? A. This schedule here just contains the shares of New Jersey Company common stock which has been pledged with F. H. Prince & Company on bank loans.

X-Q. 185. On bank loans? A. That is right. That is not all the collateral, you understand.

X-Q. 186. I believe you testified this morning, Mr. Donovan, that at the time the Maine Company loaned money to F. H. Prince & Company, that there was collateral put up with the Maine Company? A. What particular year do you refer to?

X-Q. 187. Well, in all the years in which these loans were made by Maine Company to F. H. Prince & Company and Mr. F. H. Prince. A. That is true. I did so testify.

X-Q. 188. Mr. Donovan, in 1931, 1932, and 1933, do you know whether Mr. Prince withdrew some of that collateral and sold it? A. You said Mr. Prince, didn't you?

X-Q. 189. That is correct, or F. H. Prince & Company. A. F. H. Prince & Company. Mr. Prince did not.

X-Q. 190. Did F. H. Prince & Company? A. F. H. Prince & Company in 1931 and 32 and 33—

Mr. Welch: Could I interrupt to ask if it would help you if you had the schedule to refresh your recollection?

The Witness: Yes, it would, Mr. Welch. Not that particular schedule.

Mr. Green: That is Exhibit 24.

(Petitioner's Exhibit 24 was handed to the witness.)

X-Q. 191. (By Mr. Pierson). That Exhibit 24, Mr. Donovan, is the schedule of the collateral which was put up by F. H. Prince, Mr. F. H. Prince or F. H. Prince & Company with the Maine Company on the borrowings, as I understand it, from 1922 through the year 1933? *A.* That is right. That is right.

X-Q. 192. Now, will you turn to Exhibit 24 for the years '31, '32, and '33, and state whether or not F. H. Prince & Company didn't withdraw and sell some of that collateral? *A.* Looking at the schedule for 1931, I can see some collateral that has been withdrawn by F. H. Prince & Company and sold.

X-Q. 193. Can you state what that is? *A.* December 31, 1931, it was on the statement, 141,400 Amiskeag Manufacturing 6 percent bonds. Those were withdrawn after 1931, Mr. Pierson.

1932—May I ask that question to be repeated, please?

(Question read.)

A. In the year 1932 schedule, I can see some securities that were withdrawn and sold.

X-Q. 194. Will you state what they are, please? *A.* 1100 shares of First National Bank.

X-Q. 195. Are there any others? *A.* I don't like to commit myself on that because I am not just sure how the question is intended. If you will—

X-Q. 196. Well, I will ask you with respect now to the year 1931, Mr. Donovan. *A.* All right; thank you.

X-Q. 197. Isn't there collateral there of 8,000 shares of Chicago, Milwaukee & St. Paul Railroad 5's? Bonds, rather? I said "shares." *A.* No, I don't see any.

X-Q. 198. How about 10,000 shares of Armour & Company "B"? *A.* They are not on this list.

X-Q. 199. 1500 Western Dairies? *A.* It is not on this list.

N.Q. 200. 100 Housik Mills, 7 percent preferred. *A.* That is not on this list.

N.Q. 201. Will you turn to your list for 1932, Mr. Donovan, the bonds of the Amiskeag Manufacturing Company 6's. *A.* They are not on this list.

N.Q. 202. Three thousand shares of First National Bank of Boston? *A.* Well, there is 1100 shares on here. There isn't 3,000.

N.Q. 203. Eleven hundred? *A.* Eleven hundred; that is right.

N.Q. 204. 884 shares of Soo Lease Lines? *A.* That is not on this list.

N.Q. 205. I don't believe you answered my question with respect to 1933, Mr. Donovan. *A.* That is right.

N.Q. 206. Do you have on that list any shares of First National Bank of Boston which were withdrawn and sold by F. H. Prince & Company in that year? *A.* No, Mr. Pierson because this list is made up of as December 31, 1933 so it wouldn't be on that list.

N.Q. 207. Well, do you know of any sales that were made by F. H. Prince & Company of withdrawn securities in that year, collateral securities? *A.* Yes, I do.

N.Q. 208. Would you state— *A.* Particular reference to the First National Bank of Boston.

N.Q. 209. Would you state what they were, please, and the amount? *A.* The amount that was sold?

N.Q. 210. Sold; that is correct. *A.* I haven't got the record of F. H. Prince & Company here. I would need the records of F. H. Prince & Company to answer that question.

Q. 211. (By the Member). Well, is it possible by looking at that exhibit, No. 34— *A.* Yes, Your Honor.

Q. 212. —that you have before you to see on the face of the exhibit what in each of the three years was withdrawn

from the collateral on deposit and sold? A. No, Your Honor, it isn't possible to tell that from this list.

Q. 213. Well, that is what I thought. But you say that list enables you to say what collateral was withdrawn from pledge and sold; that is, by looking at that list, I thought you said that you could answer the question? A. No, Your Honor. Mr. Pierson asked me *if I could look at this list* and see if any collateral was withdrawn. All I need do is look at the end of one year and look at the corresponding end of the next year, and if it is gone, it is gone.

Q. 214. That is precisely what I wanted to know. Are you simply testifying now that from this exhibit you are able to see in each year what collateral security of the preceding year is no longer on deposit? A. That is all I can tell by this.

Q. 215. That is all you can tell from the exhibit? A. That is right.

Q. 216. Now, from your knowledge outside of the exhibit you are able to say that the collateral which is not listed for any given year, which has been listed for the previous year, has, in fact, been withdrawn from the collateral and sold, can you? A. No, I can't say.

Q. 217. Very well.

What are you able to infer from the fact that the collateral that is on the list of one year does not appear from the exhibit to be on the list of the succeeding year, only that the collateral has been withdrawn? A. That is all.

Q. 218. From the amount of collateral on deposit? A. That is all, sir.

Q. 219. Is that all you are testifying to, that the list shows that it is on deposit as collateral one year but shows it as not being on deposit the following year? A. That is all I can tell from this schedule, Your Honor.

Q. 220. From that you infer it has been withdrawn? A. Withdrawn.

Q. 221. As collateral? A. As collateral; that is right.

Q. 222. Now, from that are you able to testify whether or not having been withdrawn it was sold? A. I can't testify from this, sir.

Q. 223. Are you able otherwise to testify that the collateral which from that exhibit appears to have been withdrawn was in fact sold? A. Not from any records I have here, sir.

Q. 224. Are you able to testify as to the facts irrespective of records? A. Well, in this way, sir: I know that at the end of a certain particular year here, as I told Mr. Pierson, there was 1100 shares of First National Bank which was withdrawn from one year to the next. Then Mr. Pierson asked me to tell him how many shares were sold. Well, I know that 1100 shares was part of a lot that was sold, but I don't know—I mean, was sold.

Q. 225. That is what I want to find out, how much knowledge you are carrying in your head. A. That is right.

Q. 226. As to the amount which was sold, and I take it now that you are not able to testify about that without reference to some other records besides this exhibit? A. That is right.

Q. 227. That is correct, is it? A. That is right, sir.

The Member: All right.

Mr. Welch: I might add—I think it is very pointless for me to add it—but in so far as the testimony is of any importance at all, I suppose the withdrawal as collateral is the critical thing no matter what its history was after the withdrawal.

Mr. Pierson: Well, I will ask a question on that.

X-Q. 228. (By Mr. Pierson). Mr. Donovan, do you know after that collateral was withdrawn to whom it was sold?

Mr. Welch: Objection. I don't know what collateral that means. Specify, if you will, Mr. Pierson.

The Member: You see, the witness has testified that he can't say without records as to whether it was sold or what part was. Now, it is pointless to ask him to whom it was sold if he doesn't know whether it was sold or not.

The Witness: Your Honor, Mr. Pierson asked me to state all of the securities that were sold. Well, I can answer that question of Mr. Pierson's, but—

X-Q. 229. (By Mr. Pierson). All of the collateral securities which were sold in the respective years? A. I mean this particular year regarding the First National Bank, I can answer it, but if he wants me to name all of the securities that F. H. Prince & Company sold in any given year, I am afraid I can't answer that, Your Honor, without the records.

Mr. Pierson: That is all right, then, Your Honor.

X-Q. 230. (By Mr. Pierson). Mr. Donovan, I believe you testified in your direct examination with respect to the dividends on stock which was acquired by F. H. Prince & Company for the Maine Company. Now, will you further state for the record just how those dividends were treated on the books?

The Member: Of whom? The recipient?

Mr. Pierson: The books of the recipient, yes.

(Question read.)

A. What stock do you mean? The Jersey Company?

X-Q. 231. (By Mr. Pierson). That is correct. A. In what years, Mr. Pierson?

X-Q. 232. In all years to which you testified. I think you started back in the year 1921. A. That is right.

Well, in 1921, as I testified, F. H. Prince & Company had an open account from the Maine Company with a debit balance on it. At that particular time that account had on it some 20,000 shares of New Jersey common. Well, when

that dividend would be—at least, quarterly the dividends were declared by the New Jersey Company on its common stock—when that dividend was received, and I should state that the stock was in the name of F. H. Prince & Company as a matter of fact, it is a common thing to have all stocks in the name of a broker no matter if they belong to a customer, to have them in a broker's name so he will collect the dividends—well, that stock being in the name of F. H. Prince & Company, the dividend was received by F. H. Prince & Company and credited on through the cash book to the Chicago Stock Yards Company as a dividend.

The Member: Wait a minute. The Chicago Stock Yards Company is which company in the lingo we have established here.

The Witness: I am sorry, Your Honor. The Maine Company.

The Member: The Maine Company.

A. (Continuing) That is credited to the Maine Company account on the books of F. H. Prince & Company.

X-Q. 233. (By Mr. Pierson). That is, it is a brokerage account on the books of F. H. Prince & Company? That is, that is the account which might be classified as a brokerage account? A. No, it wasn't a brokerage account.

X-Q. 234. Not a brokerage account? A. No, no, for the customer's account.

X-Q. 235. Customer's account? A. In other words, the Maine Company was a customer of F. H. Prince & Company, the same as you would be if you bought stocks. And to that account the dividend was credited.

Now, from 1922 on, as I stated—do you want me just to refer to F. H. Prince & Company?

X-Q. 236. Yes, if you will, please. A. From 1922 on, as I previously testified, the New Jersey Company common stock, being bought by F. H. Prince & Company for the ac-

count of the Maine Company, the Maine Company paid cash for that and those shares were transferred by F. H. Prince & Company through the transfer agent to the name of the treasurer of the company.

The Member: The name of the treasurer of the Maine Company?

The Witness: The treasurer of the Maine Company and delivered to him; that is, to the treasurer of the Maine Company, and those dividends, of course, naturally, went to the Maine Company because that is the name they were in.

The Member: Well, now, wait a minute. He wants to know what book accounting was done for those dividends by the recipient. Now, this last item that you are speaking about, the recipient, I take it, of the dividend was directly the Maine Company?

The Witness: That is right, Your Honor.

The Member: Because the shares were held in the name of the treasurer of the Maine Company for its account; isn't that right?

The Witness: That is right, Your Honor.

The Member: Now, those dividends were declared and paid by the New Jersey Corporation?

The Witness: That is right, Your Honor.

The Member: Now, to whom? Who received them and who accounted for them, and how?

The Witness: Well, those particular dividends, the last dividend went directly to the treasurer of the Maine Company who entered them, or, at least, he didn't. I did entered them on the cash book of the company as dividends received. They were on the books of the Maine Company.

X-Q. 237. (By Mr. Pierson). Didn't you make an entry on the books of F. H. Prince & Company? *A.* No, sir.

X-Q. 238. With respect to those? *A.* Not for the second group. The first group, yes.

X-Q. 239. When you say "the second group," what do you mean by "second group"? A. I mean the dividends that were credited, at least, the stock that was listed in the name of F. R. Peagram, who is the treasurer, treasurer. Those dividends went directly to the Maine Company. They didn't go to F. H. Prince & Company at all.

The Member: Well, now, my understanding of that is this: That in the earlier years F. H. Prince & Company was the nominal shareholder of the New Jersey Corporation for the actual ownership of the Maine Corporation.

The Witness: That is right. They were the nominal—

The Member: Whenever the dividends were received, or, rather, were paid on those shares by the New Jersey Company, they were received by the nominal shareholder, namely, F. H. Prince & Company?

The Witness: That is right.

The Member: And F. H. Prince & Company on its books credited those amounts as cash received to the account, the running account, of the Maine Company, whose account was to that extent, either the debit balance was diminished or the credit balance was increased?

The Witness: That is it, exactly.

The Member: All right.

Now, that is as to the earlier ones?

The Witness: That is right; yes, sir.

The Member: Now, later, as I understand it, the Maine Corporation through its treasurer became the actual shareholder of record on the books of the New Jersey Corporation.

The Witness: I refer, of course, Your Honor, as I previously testified, in 1922 F. H. Prince & Company continued to buy Maine Company common stock, or, at least, it continued to buy New Jersey Company common stock, and the Maine Company paid cash for that common stock, and that

was immediately turned over to the treasurer of the Maine Company.

The Member: Now, then, with respect to all of the shares that were then of record, on the New Jersey Company's books as owned by the Maine Corporation through its treasurer—

The Witness: That is right, sir.

The Member: —the dividends on those shares were paid by the New Jersey Corporation directly to the Maine Corporation without the intervention of Prince & Company?

The Witness: That is right.

The Member: And on the Maine Corporation's books they were simply treated as cash received and put in the cash account; is that right?

The Witness: And credited, of course, to Maine Company; that is, the dividends.

The Member: But they then lost their identity entirely just as ordinary cash?

The Witness: That is right. That is right.

I might add, however, to my answer, that when those dividends to the first group that were credited on the books of the F. H. Prince Company to the Chicago Stock Yards of the Maine Company, that the Maine Company then picked up on their books that dividend. In other words, they made a debit to so-called bankers and credited their income account so that the Maine Company got the dividend on all of the shares.

X-Q. 240. (By Mr. Pierson). When you say the Maine Company got the dividends on all the shares, was that paid out by F. H. Prince & Company yearly to the Maine Company? Were they immediately transferred over? A. No. I thought I explained that, Mr. Pierson, this morning, when I said that those were credited to the open account.

X-Q. 241. I see.

The Member: And that was done currently, wasn't it?

The Witness: It was done from—

The Member: You didn't wait until the end of the year?

The Witness: Oh, no.

The Member: As soon as the dividends were received by Prince & Company, they were credited to the Maine Corporation's account?

The Witness: That is right, exactly, sir, and also immediately picked up on the Maine Company's books who made a corresponding entry.

X-Q. 242. (By Mr. Pierson). Mr. Donovan, you testified in your direct testimony, I believe, that interest was paid by F. H. Prince & Company to the Maine Company on the borrowings. A. That is right.

X-Q. 243. Now, was that interest paid on the borrowings of cash? A. Yes, just on the borrowings of cash.

X-Q. 244. There wasn't any interest paid on the borrowings of securities, was there? A. No, sir.

X-Q. 245. Do you know whether or not, Mr. Donovan, Mr. Prince in so far as the interest he paid to the Maine Company is concerned, or the interest which was paid by F. H. Prince & Company, was claimed by Mr. Prince as a deduction on his income tax returns in those respective years when that interest was paid? A. In the particular years?

X-Q. 246. Well, in the years in which this interest which you have testified to this morning was being paid on these borrowings from the Maine Company. In those years didn't Mr. Prince claim that as a deduction on his income tax return? A. Yes, Mr. Prince did. He paid it in cash, of course. By check, rather.

X-Q. 247. Will you turn, Mr. Donovan, to S-65? Do you have the stipulation there? A. I have a copy of it.

X-Q. 248. Before you? A. This is a copy.

X-Q. 249. I believe you testified this morning, Mr. Dono-

van, with respect to approximately three million odd dollars which was loaned by Maine Company to Mr. F. H. Prince or F. H. Prince & Company; is that correct? The approximate amount was three million or three million and a half. You testified as to three particular items which approximated some three million, three million and a half dollars.

Mr. Welch: I don't understand—

A. No, I don't think I did. I don't recollect it, anyway.

X Q. 250. (By Mr. Pierson). You testified that there was some money loaned with which Mr. Prince bought Armour & Company stock. Did you not? A. No, I didn't testify to that.

X Q. 251. Well, just what was it? Just what were the circumstances with respect to the money which was loaned by the Maine Company to Mr. Prince with regard to his purchase in Armour & Company, purchase of stock in Armour & Company? A. The Maine Company didn't loan Mr. Prince any money to purchase any interest of Armour & Company. I beg your pardon.

Will you repeat the question, please?

(Question read.)

The Witness: Oh, that is all right.

A. (Continuing) In 1933—I should start out by saying, the money wasn't loaned to Mr. Prince; it was loaned to F. H. Prince & Company in 1933, and F. H. Prince & Company purchased a substantial amount of Armour & Company stock—oh, a million and sixty-seven thousand dollars worth.

X Q. 252. (By Mr. Pierson). And what was that amount which was loaned at that time? What was the account amount? A. That was in 1933.

X Q. 253. 1933. A. Well, I don't think, Mr. Pierson, that you can put one particular loan against the other unless

at least, I can't. For instance, the $1,200,000 in 1927, you recollect I said Mr. Prince borrowed that? And he borrowed it and did two definite things, and now in 1933, for example, when this stock was bought, there was a million dollars borrowed and was used to purchase Armour & Company stock.

X-Q. 254. By F. H. Prince & Company? *A.* By F. H. Prince & Company; that is right.

X-Q. 255. Now, Mr. Donovan, showing you Petitioner's Exhibit 65, or, rather, S-65, in the years 1930, 1932, and 1933, what is the total amount of borrowings therein stated? Will you state for the record? *A.* You mean at the end of each year?

X-Q. 256. Yes, at the end of each year by F. H. Prince & Company and F. H. Prince combined. *A.* The total. At the end of 1930 F. H. Prince & Company and F. H. Prince owed the Maine Company on notes $2,529,400. At the end of 1932, F. H. Prince & Company and F. H. Prince owed the Maine Company on notes, $3,408,000. At the end of '33, F. H. Prince & Company and F. H. Prince owed to the Maine Company on notes $4,848,000.

X-Q. 257. Now, Mr. Donovan, those amounts which you have just stated do not cover or covers more than the amounts to which you testified this morning with regard to those loans to F. H. Prince & Company and which were individually specified; does it not? That is, with regard to the money which was used by Mr. Prince for the building of the house and the amount which was used by F. H. Prince & Company for the purchase of stock in Armour & Company, and there was one other item, as I recall, but the amounts herein stated are more than the amounts which you stated this morning? *A.* I didn't state any figures, Mr. Pierson. I mentioned reasons why the money was borrowed, and the reasons I feel and am quite sure cover the borrow-

ings of 1933. I didn't mention any figures, as I recollect it.

X-Q. 258. Well, all of those figures contained in S-65 with respect to 1930, '32, and '33, to which you have just made reference, is not inclusive of those items that you spoke of this morning? A. It includes those items; yes.

X-Q. 259. It includes those items? A. But I didn't put any figure on items this morning.

X-Q. 260. Mr. Donovan, I show you S-52, which is attached to the stipulation, and ask you to turn to—which represents the balance sheet of the books of the Maine Company, and ask you to turn to the asset side of the balance sheet beginning with the year 1921, and I further ask you to state in what asset account these loans to which you have been testifying appear, and when I say "these loans," I mean the loans from the Maine Company to Mr. F. H. Prince and F. H. Prince & Company throughout the years 1921 to 1933. A. That would be under the Maine Company balance sheet under notes receivable.

X-Q. 261. Under notes receivable? A. That is correct.

X-Q. 262. And that is, this item of notes receivable doesn't necessarily designate the amounts of those loans; that is, it contains other notes receivable as well as those loans? A. Beginning at 1921—if you want me to take them in sequence, I can give them to you—in 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930 contain just the notes due from F. H. Prince and F. H. Prince & Company.

In 1931 there is some other notes included in there.

X-Q. 263. How about 1932 and 1933? A. In 1932 there are other notes in the accounts, and in 1933 the only notes in that account are the F. H. Prince and F. H. Prince & Company.

X-Q. 264. Mr. Donovan, are you familiar with the way the Maine Company handled the excess of the 9 percent guarantee of dividends on the so-called guaranteed stock

which was out; of New Jersey Company guaranteed stock which was guaranteed by the New Jersey Company?

Mr. Welch: Guaranteed by the New Jersey Company?

X Q. 265. (By Mr. Pierson). Guaranteed by the Maine Company, pardon me.

The Witness: Would you read that question, please?

(Question, as amended, read.)

A. I don't quite understand that question, Mr. Pierson.

X Q. 266. I will attempt to reframe the question for you, Mr. Donovan. A. Thank you.

X Q. 267. Can you state how the Maine Company treated on its books the amount received from the New Jersey Company in excess of the 9 percent guarantee which the Maine Company had made on the stock of the New Jersey Company, on the common stock of the New Jersey Company.

A. Well, if I understand you correctly the Maine Company only received from the New Jersey Company dividends on the common stock, and the preferred stock that it owned on the certificates in the name of F. H. Prince & Company as nominee, a/c Peagram, as treasurer.

X Q. 268. The excess of the amount which was received by the Maine Company from the New Jersey Company, is all I am attempting to get you to answer to, Mr. Donovan.

As I understand it, the Maine Company pays the 9 per cent guarantee on the common stock of the New Jersey Company; that is the guaranteed stock.

That it receives dividends from the New Jersey Company in excess of that amount.

How did the Maine Company treat that excess on its books?

A. Well, I repeat, that is not paid to us by the New Jersey Company.

X Q. 269. Just how is it handled on the books? A. We receive dividends—

The Member: Wait a minute. "We", you are in a lot of corporations.

The Witness: I beg your pardon.

The Member: Go ahead.

4. The Maine Company receives dividends from the Chicago Junction Railway Company and the Union Stock Yards and Transit Company.

The Member: Take the situation: Is it the fact that the Maine Company, as the shareholder of the New Jersey Corporation, did receive dividends in excess of 9 percent?

The Witness: Well, Your Honor, those dividends —

The Member: I say, is that the fact, did it or didn't it?

The Witness: We did not receive dividends from the New Jersey Company directly for any earnings over 9 percent.

The Member: Did the New Jersey Corporation declare and pay dividends in excess of 9 percent on this guaranteed stock?

The Witness: No, sir.

The Member: That is the answer.

Mr. Welch: I can clear it up. There was a by-pass agreement by which —

The Member: I don't want you to clear it up for the moment. I want to get it straight before Mr. Pierson can get an answer. I want the hypothesis established, and, as I understand it, there is no such hypothesis.

Mr. Welch: If Mr. Pierson would think about it a moment he probably would know what it is.

The Member: He is probably thinking about it a great deal.

X-Q. 270. (By Mr. Pierson). Mr. Donovan, let me state it this way: The excess that the Maine Company receives on the stock of the New Jersey Company, common stock of the New Jersey Company, which it does not own and the guaranteed 9 percent on which the New Jersey Company

pays, how is that treated on the Maine Company's books?

Mr. Welch: I think I will object to that on the ground that I don't understand it.

The Member: Mr. Pierson, you are stating a situation of fact. If the fact does not appear of record your hypothesis is not worth anything.

Here you are asking this man a question about how the Maine Company treats it on the book which, by its own hypothesis, it never receives. Is that what you intended?

Mr. Pierson: No.

The Member: That's what you said: Upon a stock which it does not own and in that regard you were prompted by your associate here to change it from the stock which it does own to the stock it does not own.

Then you assumed it received dividends on a stock it didn't own and then asked how it accounted for excess dividends on stock it didn't own. Now it is a balled-up mess.

X-Q. 271. (By Mr. Pierson): Mr. Donovan, there is in evidence a contract upon which dividends are paid, as you have stated, by the Transit Company directly to the Maine Company under that contractual agreement. Now, there is also paid from the New Jersey Company to the Maine Company dividends under that contractual agreement.

I am asking you as to how the Maine Company treats that excess of dividends that it receives over the nine per cent which is paid to the guaranteed stockholders, common stockholders of the New Jersey Company.

A. I think I understand the question now.

That agreement, Mr. Pierson, referred to, has directed the Chicago Junction Railway Company and the Union Stock Yards and Transit Company to send their dividends directly to the Maine Company.

In other words, they are by-passed, if I may use that word, through the New Jersey Company to the Maine Company, but there is no declaration in the books of the New Jersey Company because it is an agreement of 1914, I believe.

X-Q. 272. How does the Maine Company handle that on its books? *A.* They use it as income; that is, they treat it as income, I mean.

X-Q. 273. And the New Jersey Company pays out the nine percent on the dividend which is guaranteed by the Maine Company? *A.* Well, under that same agreement.

The dividend is paid but it is sent from the West to the bank, who distributes the dividend, but the New Jersey Company pays nine percent on its common stock.

That is, during these years 1930 to 1933, I suppose you are talking about?

X-Q. 274. That is right. *A.* That is right; yes, sir.

Mr. Pierson: That is all.

Mr. Welch: That is all, Mr. Donovan. (Witness excused.)

The Member: Now, what is your program, gentlemen?

Mr. Welch: I am quite ready to state I have only two and possibly three more witnesses all of whom are experts, and as I stated to Your Honor yesterday I would like to start the expert testimony tomorrow, if it works out to Your Honor's satisfaction.

The Member: You mean that will be your whole case, three more expert witnesses?

Mr. Welch: Possibly only two but perhaps three.

The Member: Will the Government be ready to proceed, then, with its case?

Mr. Clark: Yes. I shall have three and possibly four experts.

The Member: How long do you suppose these experts will take?

Mr. Welch: An expert is generally measured by the length of his cross-examination. I should say my first expert, who goes on tomorrow, will probably take not over an hour in direct and very likely somewhat less. That is the only promise I can make.

The Member: I don't want a promise, I just want an estimate as best you can make it. Are these experts all experts in the same field; directed to the same facts?

Mr. Welch: They are, if Your Honor please.

The Member: So that the cross-examination of the first one would probably bear the brunt of the attack and leave the other two with fairly less cross-examination, I suppose.

Mr. Welch: I would think so.

The Member: You think your case will all be in tomorrow?

Mr. Welch: I should think that very likely.

The Member: Some time tomorrow morning or afternoon?

Mr. Welch: No, afternoon, I would guess.

The Member: So that gives the Government notice enough so that it will be ready to proceed—

Mr. Clark: Ready to proceed on Friday, yes.

The Member: Won't you be ready tomorrow afternoon?

Mr. Clark: I wouldn't want to promise that and I would rather have, if Your Honor would be lenient in that regard, I would rather start on Friday.

The Member: That will depend somewhat on how much

time tomorrow we will have available. If this case goes on most of the day it wouldn't be wasting very much time to hold over until Friday.

If, on the other hand, the Petitioner's case is finished by the noon hour, or shortly after the noon hour, I should think we ought to not suspend then and waste all the rest of the day.

Mr. Clark: I have no desire to delay the proceedings, as I think Your Honor is quite aware.

The Member: I should think it would be reasonable to have your witnesses ready to go on tomorrow afternoon, if not before. I think we can act on that assurance, but I shouldn't think we should suspend for the whole afternoon tomorrow.

Let us proceed on that assumption. We can tell better by tomorrow luncheon time what the situation is.

Mr. Clark: Oh, yes.

The Member: We will suspend now until 10 o'clock tomorrow morning.

(Whereupon, at 4:20 o'clock, p. m., February 1, 1939, the hearing in the above-entitled matter was adjourned.)

[Title omitted.]

FOURTH DAY.

REPORTER'S MINUTES.

[Filed February 6, 1939.]

Hearing at Washington, D. C., on the 2nd day of February, 1939, at 10 o'clock a. m.

The hearing in the above-entitled proceeding was resumed on this the 2nd day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

Mr. Green: If Your Honor will recollect, Exhibits 11 and 12 were introduced with the agreement that photostatic copies might be substituted for the originals.

Exhibit 11 was the report of the Produce Terminal Corporation for the month of December, 1933, and Exhibit 12 was the report of the Transit Company for the same month. I have the photostatic copies here now, and I want to make just one observation about them for the record. Figures which appear in parentheses on these photostatic copies were in red on the original exhibit.

I offer in evidence a sheet headed "Chicago Stock Yards Company," which contains quotations of New Jersey common stock and other data for the years 1911 to 1933, inclusive. I understand, Mr. Clark, there is no objection?

Mr. Clark: No objection.

Mr. Green: May that be marked Mr. Ray?

The Clerk: Petitioner's Exhibit No. 38.

(The document so offered and received in evidence was marked "Petitioner's Exhibit 38," and made a part of this record.)

Mr. Green: On page 31 of the stipulation there is a reference to a plan which was prepared in accordance with the requirements of the decree in the Packers Case. That decree has been introduced in evidence as Petitioner's Exhibit 23. On that page it is stated that a copy of the decree in the same case, under date of February 27, 1920, in accordance with which the plan which is attached to the stipulation marked S-57 was prepared may be offered in evidence.

I offer in evidence a decree in the Packers Case, dated February 24, 1921, approving that plan.

Mr. Clark: No objection.

The Clerk: Petitioner's Exhibit 39.

(The document so offered and received in evidence, was marked "Petitioner's Exhibit 39," and made a part of this record.)

Mr. Green: I understand that this Court takes judicial notice of the statutes and decisions in the several States of the United States in accordance with the District of Columbia Equity Rules. I wish to call the attention of the Court to the New Jersey Revised Statutes of 1937, Title 14, Chapter 11, Section 14:11-8. That statute provides, in brief, that the charter of a New Jersey corporation may be extended by a vote of two-thirds, each class of stock entitled to vote.

I also wish to call the Court's attention to the New Jersey Revised Statutes of 1937, Title v-4, Subtitle 2, Chapter 4, Section 54:4-1, and the following sections: These sections provide that, in brief, all property, tangible and intangible, of New Jersey corporations, are subject to a local personal property tax in New Jersey, and in connec-

tion with that statute I should like to call the Court's attention to the case of New Jersey Bell Telephone Company, the City of Newark, 118 N. J. L. 496, 193 Atlantic 844, and to the case of Newark Fire Insurance Company, the State Board of Tax Appeals, 118 N. J. L. 525, 193 Atlantic 912.

Mr. Welch: Mr. Blough.

Mr. Clark: Just a moment, Your Honor. There is another gentleman whom I would like to ask to sit at the counsel table here, and I am wondering if I can have another chair, in some way?

Mr. Welch: I think there is a chair to spare, so to speak. There is one here, Mr. Clark.

The Member: We can get a chair for you.

Mr. Green: If Your Honor please, in Exhibit 39, the wrong date was given. The date of that decree was February 24, 1921.

MR. CARMAN G. BLOUGH

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination:

Q. 1. (By Mr. Welch). Your full name, please, Mr. Blough? A. Carman G. Blough.

Q. 2. And were you sworn just now? A. I was.

Q. 3. Where do you live, Mr. Blough? A. 206 Bell Avenue, Highland Park, Illinois.

Q. 4. And what do you do, sir? A. I am associated with the public accounting firm of Arthur Anderson & Company.

Q. 5. And they are located where? A. The office with which I am connected is the home office in Chicago, Ill. We have offices all over the United States.

Q. 6. Mr. Blough, I wish if you would, sir, that you would give us a little sketch of your life, paying particular at-

tication, certainly, when you reach that part of it, to your experience in so far as it has had any relationship to corporate finance and financial practices of corporations. A. I am a graduate of Manchester College and have had four years of graduate training in Columbia, Chicago, Wisconsin, and Harvard Universities. I hold a Master of Arts degree in business economics from the University of Wisconsin, and have completed the residence and general examination requirements for the Ph.D. and business economics at Harvard University.

Q. Mr. Blough, could I interrupt for a moment? I am under the impression you are going pretty rapidly for our very competent stenographer, and I suggest you go a bit more slowly on this because it comes pretty rapidly from you. A. I am sorry.

I taught accounting and corporate finance at the University of Wisconsin, at one time. I was professor of accounting and head of the accounting department at the University of North Dakota. I was professor of economics and head of the social science department at Armour Institute of Technology and special lecturer in accounting at American University. I am a certified public accountant in the States of Wisconsin and North Dakota and was, at one time, a member of the Wisconsin State Board of Accountancy. I was at one time employed by the Wisconsin Tax Commission and while with that organization I was first a corporation field auditor; subsequently, assistant chief in the income tax division in charge of corporation income taxes and subsequently chief of the Public Utilities Division of that Commission. As chief of the Public Utilities Division it was my duty to value the railroads and public utilities in the State of Wisconsin for tax purposes and to recommend assessments of such properties to the State Tax Commission which was responsible for that function. I was at one time

secretary of the Wisconsin State Board of Public Affairs—

Q. 8. Could I interrupt you a moment? In this last work that you did, did that involve any analysis of financial statements of companies? *A.* Yes, sir. In the valuation of railroads and public utilities under the so-called unit rule, which is the rule for taxation of public utilities and railroads in Wisconsin, a determination is made of the value of the entire business. Then, for the purpose of obtaining the value of the companies' properties in Wisconsin, an allocation is made to Wisconsin on the basis of various factors that are involved. Now, in arriving at the value of a business as a whole, it is necessary to take into consideration the financial condition of the business, its financial history, its prospects, economic conditions in general which would reflect on the probable value of that business in its entirety.

Q. 9. Thank you, sir. Now you may go ahead, if you will, on later experience. *A.* For a period of time I was secretary of the Wisconsin State Board of Public Affairs, and as such I was the budget director of the State of Wisconsin and had charge of specifying the records and accounts to be kept by the various State Boards, departments, commissions, and institutions. I had charge of the auditing of those bodies and making recommendations to the Legislature on appropriations; also to advise the Governor with regard to the financial affairs of the State. For a period of three years, along with other duties, some of these other employments I have mentioned, I was special appraiser for the Dane County Court.

Q. 10. In the State of Wisconsin? *A.* In the State of Wisconsin. Dane County is the county in which Madison, the capital, is located. The Dane County Court under the statute of Wisconsin as it existed at that time has jurisdiction over the estate of persons who died resident of Dane

County and also over the inheritance taxation of properties in Wisconsin and securities in Wisconsin corporations possessed by persons who died non-residents of the State of Wisconsin, so that in the course of my work as special appraiser it was necessary for me to evaluate these securities of Wisconsin corporations that were left in the estates of persons who died as residents of Dane County or as non-residents of the State of Wisconsin, and in order to arrive at the value of those securities it was necessary to consider the financial history of the corporations that had issued the securities and to make the best estimate possible as to the probable future prospects of those companies in order to reflect the value of their securities at the date of death. Of course, if the securities were listed on national securities exchanges the problem was simple, but a very great number of them had no market at all except occasional markets over the counter. At one time I was consulting accountant for the Illinois Commerce Commission which is the public utility regulatory body in the State of Illinois, and from shortly after its creation until the last July I was associated with the Securities and Exchange Commission.

Q. 11. That is the Federal body? A. The Federal Securities and Exchange Commission.

My first connection with that Commission was as an analyst and as an analyst it was my duty to analyze the financial statements filed—the registration statements filed by corporations seeking to sell their securities in interstate commerce or through the mails, and, therefore, subject to the Securities Act of 1933. It was my duty to study those registration statements for the purpose of determining whether or not significant information necessary to the proper appraisal of the value of securities was included, or whether there was any misrepresentation of information

that would materially affect a valuation of securities. Subsequently I was assistant chief or assistant director in the registration division.

Q. 12. May I interrupt once more, I think once again we have a tendency to go a little fast. A. I am sorry.

As assistant director in the registration division, I had charge of the registration of securities that were to be listed on national securities exchanges, and as assistant director it was my responsibility to supervise the analysis and examination of the registration statements filed under the Securities Exchange Act of 1934, for the purpose of determining whether or not the necessary information for a sound evaluation of securities was contained or whether there was a material misrepresentation. Subsequent to that, I was chief accountant for the Securities and Exchange Commission, and as such I had responsibility for the accounting policies and the general administration of the accounting examinations of statements filed with the Commission under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Public Utility Holding Company Act of 1935. In addition to the continuation of association with the analysis of financial statements under the 1933 and 1934 Act, my position as chief accountant made it necessary for me to work closely with the Public Utilities Division of the Commission. The Public Utilities Division had charge of the administration of the Holding Company Act and under that Act the Securities and Exchange Commission has authority in great detail over the financial practices of public utility holding companies and their subsidiaries. For example, if a holding company or its subsidiary wished to revise its financial structure in any way, it was necessary

Mr. Clark: Your Honor, I want to object at this point.

The Member: I don't think this involved discourse on principles is necessary to qualify the witness.

Mr. Welch: As to what he actually did?

The Member: As to what he actually did, well enough, but if he takes his ideas of what ought to be done, that doesn't help.

Q. 13. (By Mr. Welch). Mr. Blough, just what you actually did in the way of analyses of these holding companies and subsidiary companies. *A.* When a statement was filed by a public utility holding company or its subsidiary asking permission to revise its financial structure or to declare dividends, I analyzed the financial statements of the company and made recommendations to the Commission as to its policies.

Q. 14. Do you belong to any societies that would be of any interest to us? *A.* Well, I am a member of Beta Gamma which is an honorary commerce fraternity, scholastic fraternity; of Beta Alpha Psi, which is an honorary scholastic accounting society; of the American Accounting Association, which is made up largely of university professors in accounting and others interested in the development of accounting principles, and of the American Institute of Accountants, which is the national organization of practicing public accountants. I am vice president of the American Accounting Association and a member of the committee on accounting procedure of the American Institute.

Q. 15. Have you testified before as an expert? *A.* Yes, sir; I have testified on various occasions as an expert in accounting and also as an expert in finance and financial analysis.

Q. 16. Now, I take it from what you have said you have had repeated occasions which requires study on your part of corporations and their financial set-ups. *A.* Yes, sir. I think, as I have indicated from the history of my life,

my whole working life has been devoted to work which necessitates the analysis of financial statements in one way or another.

Mr. Welch: I offer the witness as an expert who will testify on the point as to whether or not the funds of the Maine Corporation have been accumulated beyond the reasonable needs of its business.

The Member: Do you want to cross-examine now, as to qualifications?

Mr. Clark: Yes.

The Member: You may do so.

Cross-Examination.

The Member: You know the reason I am facing the other way (addressing the witness) is that your rocking on that chair distracts me so I can't pay attention to your testimony.

The Witness: I am sorry, Your Honor. I will stop that. Could I have a straight chair, please?

Mr. Welch: Yes; that would be a simple solution.

Mr. Green: I have the only one in the room.

(A straight chair was given to the witness.)

X-Q. 17. (By Mr. Clark). Now, Mr. Blough, you say you graduated from Manchester College. When was that? A. 1917.

X-Q. 18. 1917. Now, what did you do immediately after? The reason that I am asking you this and going to ask you further questions is because you went so rapidly that I couldn't possibly follow you, there were so many activities you seemed to have been engaged in. What did you do immediately after that? A. Well, immediately after that I taught in Bridgewater College, Bridgewater, Va., which I didn't mention as part of my qualifications.

X-Q. 19. For how long did you teach there? A. One year.

X-Q. 20. What did you teach? A. I taught accounting and finance and commercial law.

X-Q. 21. And then what did you do? A. And then I went to Fon du Lac, Wisconsin, where I taught in the high school and practiced accounting on the side.

X-Q. 22. How long did you stay there? A. Two years.

X-Q. 23. Then what did you do? A. Then I went to the University of Wisconsin.

X-Q. 24. And there what course did you take? A. I did graduate work—pardon me. I should have mentioned that before that time, during the summers, I attended Columbia University and Chicago University, which I mentioned in my testimony.

X-Q. 25. During what summers? A. Summer of 1918; summer of 1920.

X-Q. 26. All right.

Now please repeat what you did at the University of Wisconsin. A. I did graduate work in economics and business administration, and instructed in accounting and corporation finance.

X-Q. 27. After that what did you do? A. I went to the Wisconsin Tax Commission. I was with the Wisconsin Tax Commission for five years.

X-Q. 28. In what capacity? A. I was corporation field auditor for about three-quarters of a year. Then I was assistant chief of the Income Tax Division for about a year and a half. Then I was chief of the Public Utilities Division for about two years and a half.

X-Q. 29. As corporation field auditor, what were your duties? A. To go out in the State of Wisconsin and examine the corporations' accounts and records for the verification of their income tax returns.

X-Q. 30. Income tax returns to the State of Wisconsin? A. That is right. Wisconsin had the first income tax, and

X-Q. 31. Well, no. I am just asking you that. Please strike the last answer. Now, as chief of the Income Tax Division, what did you do? What were your duties? A. I was assistant chief, and I had charge of the auditing of the income tax returns of corporations, both in the office and outside in the field.

X-Q. 32. The auditing. Just what do you mean by "auditing"? A. Well, the office audit of an income tax return involves taking the return itself and studying it carefully and examining it for any possible deficiencies. I should think that an officer of the Internal Revenue would know exactly what that is.

X-Q. 33. Well, no. I am asking you. I am asking you. A. I have told you.

X-Q. 34. All right.

The Member: Now, don't be smart about this. The questions are being asked to you respectfully and you are to answer them respectfully.

A. (Continuing) In the field, the field auditing was going into the corporations' accounts and records, and verifying their books to whatever extent seemed necessary, making comparisons with the income tax returns to determine whether or not the returns had been properly filed.

X-Q. 35. Now, in the Public Utilities Division, what were your duties and activities? A. There it was my duty to get all of the information that I could possibly get about the public utilities and the railroads whose properties were valued by the Commission. We got that in various ways. We called for a very comprehensive report from each company which specified financial facts in great detail. We took —we studied the securities markets to determine the price of the companies' securities. We on occasion examined the

accounts of the company to get special light on the policies of the company. We studied the files of the State Railroad Commission, as it was then known, which was the Public Utility regulatory body.

X-Q. 36. When you say "we," you mean yourself, personally? *A.* I and my staff. We sought all of the criteria that we could that would give some indication as to what the value of the company was, determined its earning power from its accounts and from such adjustments as seemed would have to be made to reflect the earning power from the standpoint of the salability of the company, capitalized that income for the purpose of arriving at a valuation.

We got reports from the Interstate Commerce Commission on the physical valuation of the railroads and from the Railroad Commission on the physical valuation of the public utilities in the State,—everything that we could get that would reflect on the value of the property.

X-Q. 37. Now, to what date does that carry your experience? *A.* That carries my experience to March of 1927.

X-Q. 38. Then what did you do? *A.* Then I was in charge of the State Budget, from March—

X-Q. 39. State Budget of what State? *A.* Of the State of Wisconsin.

As I stated, I was secretary of the State Board of Public Affairs, and, as secretary, I was the administrative officer of an ex-officio board that made recommendations on budget. That carries me to September, 1929.

X-Q. 40. What did you have to do in that regard? *A.* Well, in that job, it was—I and the staff examined the accounts and records of the boards, departments, commissions, and institutions. We inspected the properties; we specified the accounts that should be kept, and required revisions of the accounts.

X-Q. 41. What do you mean when you say the accounts

that should be kept? Accounts of what sort? A. Each State board, department, and commission in the State of Wisconsin is required to keep accounts itself. That is, the University had to keep complete records of its own, showing its income and its disbursements. The Tax Commission had to keep detailed accounts of its own. Every board, department, commission in the State had to keep accounts, and those were specified. We had a uniform system which we worked out, and we specified the accounts that they should keep. And then we audited those accounts after the end of the year just as a public accountant would audit the accounts of a private enterprise at the end of the year.

We set up the budget showing the past expenditures and the requests of the institutions and departments for the succeeding year. We inspected the properties and studied the operations of the boards, departments, and commissions, and made recommendations to the Legislature.

X-Q. 42. Recommendations of what sort? A. As to the amount of the appropriations that should be made and the purposes that they should be made for.

X-Q. 43. From the State funds? A. From the State funds; that is right.

X-Q. 44. Now, to what date does this carry you? A. September, 1929.

X-Q. 45. And then what did you do? A. Then I went to the University of North Dakota, where I taught.

X-Q. 46. And what did you teach there? A. I taught accounting for the most part. I was head of the Accounting Department and taught accounting for the most part, but during one semester I taught a course in corporate finance and another one, public utilities.

X-Q. 47. Where did you take your instruction in corporate finance? A. I took courses in corporate finance at

Manchester College, at Chicago University, and at the University of Wisconsin.

X-Q. 48. Well, now, please tell me, or tell the Board, for how long you took those courses at each of those institutions? *A.* At Manchester College I had a course which ran for two years, which was the equivalent of six months. At the Chicago University I took a course for just one summer's session. At the University of Wisconsin, I took three courses that were tied into corporate finance. One, corporation finance itself; one, the analysis of financial statements; and, a third, money and money markets.

X-Q. 49. For how long? *A.* For one year.

X-Q. 50. Did you at any time receive any degree as a result of the courses that you took in corporate finance? *A.* Yes, sir.

X-Q. 51. And what was that? *A.* The Master of Arts Degree.

X-Q. 52. Yes. *A.* In business economics.

X-Q. 53. Where? *A.* University of Wisconsin.

X-Q. 54. And when? *A.* 1922.

X-Q. 55. Was that the result solely of your studies at the University of Wisconsin? *A.* That is right.

X-Q. 56. And for how long did you say that continued? *A.* At the University of Wisconsin?

X-Q. 57. Yes. *A.* I was there two years.

X-Q. 58. Now, I have forgotten just at what point we stopped. *A.* You left me at the University of North Dakota, where I was teaching.

X-Q. 59. Oh, yes. North Dakota. When was that? *A.* From 1929 until 1932.

X-Q. 60. And then what did you do? *A.* Then I went to Harvard University on leave of absence from the University of Dakota.

X-Q. 61. What courses did you take at Harvard Univer-

sity? A. At Harvard University I studied money and banking, public finance, economic theory, public utility economics, and seminar in corporation finance.

X-Q. 62. How long were you there? A. I was there just one full year.

X-Q. 63. And in what department was that? A. I was a candidate for Ph.D. in business economics, and that degree is jointly administered by the graduate school of the College of Economics Department and the graduate school of Business Administration.

X-Q. 64. Did you receive any such degree? A. I did not. I passed the general examinations which leaves nothing to be done except the thesis.

X-Q. 65. Then what did you do? A. Then I went to Armour Institute of Technology in Chicago.

X-Q. 66. Then what did you do there? A. I was head of the economics—of the Social Science Department and taught economics, professor of economics.

X-Q. 67. Now, in that capacity what did you teach or what were your activities? A. Well, I taught a course to seniors which was called "Public Policy," and which related to the relationship between corporations and the Government. I taught a course in business and engineering problems, which took up the financial aspects of the businesses in which engineering problems were basic.

X-Q. 68. What financial aspects do you mean? The aspects relative to the corporations themselves? A. The organization of a corporation and the financing of a corporation, methods of obtaining money and money markets, and so forth, attempting to convey to the engineering students these fundamental financial concepts of the business which they were going into later.

X-Q. 69. How long did you stay there? A. I stayed there until the fall of 1934,—in the summer of 1934,—when I be-

gan to have some correspondence with the S.E.C., which was then just being formed, persons who had been appointed to the S.E.C., and I was appointed by the S.E.C. in the early part of October, but I wasn't able to find—the school was not able to find a successor for me until the last of November. I left the school in the last of November and took up my duties with the S.E.C. the first day of December, 1934.

X-Q. 70. What were you doing with the S.E.C.? A. Well, my first position there was as a security analyst, and that—

X-Q. 71. Well, just tell me what you did in that regard? A. Well, as a security analyst, a registration statement filed under the Securities Act of 1933 would be given to me for examination and analysis. I would go through that registration statement in detail.

X-Q. 72. What is a registration statement? A. A registration statement is a statement that is required under the 19—

X-Q. 73. No. What I want to know is what it is. A. Well, it is a statement filed by any corporation wishing to sell securities in interstate commerce or through the mails to support a prospectus which must be issued by the company in connection with any such sales. And this registration statement is a document that is partly a questionnaire in form set up by the Securities and Exchange Commission which requires answers in detail, and then it calls for any other material information necessary to—I have forgotten exactly the wording of it, but anyway, it requires that any significant information necessary to a financial judgment be supplied.

X-Q. 74. Please tell me what these statements are that have to be made? What sort of statements are they? A. Well, in the first place, it calls for a profit and loss statement for three full fiscal years, and profit and loss state-

ments from the close of the last fiscal year up until a date within 90 days of the date this State registration statement is filed for the registrant. It also requires a balance sheet as of the date within 90 days for the registrant. It requires consolidated profit and loss statements and balance sheets for the registrant, and its subsidiaries. In case there are some subsidiaries that are not included in consolidation, it requires separate statements for them; copies of the charter; copies of the by-laws; copies of the indentures; statements as to the relationship between the registrant and underwriters, and persons in control or affiliated with the registrant; information regarding salaries of significant officers and directors; the names of the officers and directors, and the nature of the business; the history and development of the business.

X-Q. 74. Pardon me just a moment. Now, that was in 1934 that you went to the S.E.C.? *A.* That is right.

X-Q. 75. How long did you stay there? *A.* I stayed there until July 1, 1938.

X-Q. 76. 1938. And then what did you do? *A.* You mean after I ceased being an analyst for the Commission, or after?

X-Q. 77. Yes. *A.* Or after I left the Commission?

X-Q. 78. Well, as I understood it you left the Commission in 1938. Did you cease to be an analyst prior to that time? *A.* Yes, sir.

X-Q. 79. What were you after that? *A.* I was assistant director.

X-Q. 80. Assistant director? *A.* In the Registration Division.

X-Q. 81. In that capacity, what were your duties and activities? *A.* In that capacity I had charge of that portion, of that part of the Securities and Exchange Commission that was responsible for the analysis and examination of the

financial statements—of the registration statements that were filed under the Securities Exchange Act of 1934, and those statements are very similar in their nature to the ones I just described for the 1933 Act.

X-Q. 82. Now, then, what did you do after July 1, 1938? *A.* After I was assistant director, I was also something else with the Securities and Exchange Commission.

X-Q. 83. I see. Well, you were still with the Securities Exchange? *A.* No, sir.

X-Q. 84. When did you leave there? *A.* July 1, 1938.

X-Q. 85. Then what did you do? *A.* I went with the firm of Arthur Anderson & Company, a public accounting firm.

X-Q. 86. What are your duties there? *A.* My duties there are to coordinate the policies of the various offices that the company has throughout the United States. We are in the public accounting business, public accountants and auditors. We have our offices scattered from Coast to Coast, from Milwaukee to Houston, and in an organization of that kind it is a real problem to keep those widely separated offices following the same principles and procedures of accounting and auditing, and to follow the same policies in general. My primary responsibility with the Commission—with the firm, is to coordinate those policies.

Mr. Clark: For what purpose are you offering this witness?

Mr. Welch: The purpose was stated.

Mr. Clark: Well, I just wanted—

Mr. Welch: I beg your pardon. It is expected that he will testify that the earnings—

Mr. Clark: Oh, excuse me just a moment. May I interrupt before you go into that?

Mr. Welch: You admit his qualifications?

Mr. Clark: No.

Mr. Welch: I offered him as an expert who will testify that the gains or profits of the Maine Company, the taxpayer in this case, have, in his opinion, not been allowed to accumulate beyond the reasonable needs of the business.

Mr. Clark: I don't think the witness is qualified to answer that, Your Honor. It seems to me that he is primarily an accountant and auditor, and I feel he is not qualified.

The Member: I have serious doubt and I have expressed this before as to whether the subject matter is the subject matter which is to be proven by so-called expert evidence. That has nothing to do with the qualifications of the witness but I would like to have that considered before we go any further. I am trying to find, here, in the Supreme Court's opinion covering the National Grocery Company case, which is the only opinion of the Supreme Court that relates to this section. What I am sure is here, now, is this quotation from Judge Learned Hand's opinion in the United Business Corporation case in which a question of the constitutionality of this provision of the statute was considered with regard to this accumulated surplus provision, and it was said there, and I now have the quotation here: "Judge Learned Hand said in *United Business Corporation* v. *The Commissioner*, 62 F. (2d) 754, 756: "—which is quoted by the Supreme Court in the Grocery case, in 304 United States 282 at page 290, this language:

"Standards of conduct, fixed no more definitely, are common in the law. The whole law of torts is pervaded by them: much of its commands are that a man must act as the occasion demands, the standard being available to all. The vice of fixing maximum prices is that it requires recourse to stands beyond ascertainment by sellers, by which therefore they cannot in practice regulate their dealings. That is not true of the reasonable needs of a business, which is immediately within the ken of the managers, the supposititious standard, though no indeed objective, being as accessi-

ble as those, for example, of the prudent driving of a motor car, or of the diligence quired in making a ship seaworthy, or of the extent of proper inquiry into the solvency of a debtor."

There the quotation ends. I think that that indicates rather that the subject is not an expert subject at all but is a subject upon which the Board, as the trier of the facts, must evaluate the direct evidence of the facts without regard to what any professional man, be he a certified public accountant or a financier or what not, and no matter how well qualified he is to testify on the subject hypothetically.

I should think that the Witness Prince, for example, might have something of interest and value to say on this subject as to the reasonable needs of the business, but I doubt very much whether a man of this man's qualifications has anything to contribute that will enable the Board better to decide the case. What do you say about that?

Mr. Welch: Well, as I think Your Honor will remember, expert evidence was offered in the Grocery case.

The Member: Yes.

Mr. Welch: And I have felt from the time I have met this fascinating case that it was, to a notable extent, a parallel of the National Grocery case, and nowhere throughout the course of that case did I observe the difficulty which Your Honor is now suggesting.

As we, all of us in the room, know, expert evidence was offered. It is like, I suppose, an evaluation of the question. What experts say is thought to be of some aid to the fact-finding body.

The Member: Let me ask you, before you go any further: What is an expert in this field?

Mr. Welch: Your Honor puzzles me by the question. I am not sure—

The Member: Is it any one who can express an opinion?

Is he an expert? I would like to have you liken, if you can, or will an expert in this field compare to an expert, for example, in the scientific or medical field? There you have, unquestionably, some esoteric knowledge that is not available and is not probably appreciable or appreciable by an ordinary person like myself, but I take it that the Board of Tax Appeals has got the job of determining this question of the reasonableness of the accumulation for the needs of the business, if that be properly in issue in any case. Who is the expert?

If the question is similar to the question of negligent driving in a tort case, do you put an expert on the witness stand as to the reasonableness of his care in driving the car? I suppose not; do you?

Mr. Welch: No.

The Member: That is the question that the jury has to decide, and it has to decide it from its common knowledge of ordinary affairs of life, but I am unable to see what the nature of the expert question is in this case and after that I am unable to know what are the qualifications of an expert in this field. Certainly if is not a man who happens to have gone to school.

Mr. Welch: Could I take the doctor example that Your Honor put, for a moment?

The Member: Yes.

Mr. Welch: Let us suppose that we are trying, here, as some of us have, a malpractice suit against a doctor, and the doctor is accused of not having lived up to the standards of conduct in his profession in that vicinity.

You then call to the stand other doctors and experts and they say, "We know what doctors do. We know the standards of conduct of doctors in this vicinity. These are the standards, and in my opinion this doctor lived up to those standards."

Now, in this case, we are testing here the conduct of the managers of the Maine Company in running this business. The accusation, so to speak, is that they acted unreasonably; they accumulated funds quite beyond the reasonable needs of the business, and so, as in the doctor case, we call an expert and we ask him to appraise the conduct of these men in their field, as the doctor's conduct is appraised, and have them say to the Board from their experience whether or not that conduct was reasonably prudent conduct in that particular field, and I thought I—

The Member: But this man hasn't been in that particular field.

Mr. Welch: I thought I heard Your Honor say his qualifications seemed to you excellent but you were doubtful about the propriety of receiving any testimony.

The Member: His qualifications are excellent in so far as he has demonstrated he is a man of learning and a man of education but not a word as to his ability to manage a stock yards or any such corporation as the Petitioner, here.

I suppose if he were an expert in that field they would have hired him to run the stock yards long ago.

Mr. Prince got $150,000 a year for doing it.

Mr. Welch: Your Honor will have observed in his testimony as to what he did with the S.E.C.; he studied, in particular, in the utility fields, the conduct of those firms and the question of their dividend policy and the reasonableness of it. That experience alone, over so long a period and so many corporations, would qualify this witness to say to us whether or not the people that ran this enterprise measured up to the standards of conduct in that business in declaring dividends or declining to declare them.

The Member: I have very serious doubt about it.

I see my friend Dr. Friday in the room. He is no doubt going to be called in this case, as he has been in other cases.

and he has heard me express my doubt as to his qualifications in a case like this involving 104 which had nothing to do with stock yards.

Is this man an expert in any business that the Commissioner may see fit to say has brought itself within section 104 merely because he knows how to analyze balance sheets and determine from the Securities and Exchange Commission's standpoint whether there shall be a registration of a prospectus or securities to be covered by a prospectus?

It seems to me the field is so wide it is impossible to conceive of as being an expert field for the purposes of the application of this section, however expert it may be for other purposes.

I am glad to hear your view on it, and I think probably I will have to receive the evidence only because there is some doubt about it, but I have my own view that it is all of very scant help.

Some day maybe the law will be established on it. I tried to do my part in the Rands case, to take the question up, but they settled that case on appeal and we haven't any more law now than we had then.

Mr. Welch: I would like to say this, if we were trying the case to Your Honor alone I would be delighted to close the case without expert evidence on either side.

As I understand it, the case will be reviewed by other members of the Board, and it is thinkable that other members of the Board might find some assistance in what an expert of this type will say.

It is my hope that you will receive the evidence although it is clear in my own mind it will not be given great weight by you.

The Member: Let me ask you another question in an entirely different field, and that is as to the way this ques-

tion arises, and I have been struggling with that ever since the case began.

The Commissioner made no finding as to the unreasonable accumulation in business. He hasn't said that that is why the corporation is to be taxed with a 50 percent additional tax, and that tax is only imposed when the purpose—that is to say, the corporation is availed of for the purpose of enabling its shareholders escape the surtax through the nondistribution of its profits and then the unreasonable accumulation is added in the suit as making a prima facie case. How does this question get into the case?

Is it because the taxpayer on his own account saw fit to allege a negative which the Commissioner denied?

The taxpayer said, "It ain't so," and the Commissioner says, "I deny it ain't so;" and you come here with a most peculiar issue and I still don't know what the issue exactly is and what it is this evidence is now intended to establish affirmatively.

Mr. Welch: If Your Honor please, it is not a happy situation for a lawyer. We have this blanket determination and as you point out quite accurately there is no allegation on the part of the Commissioner that we did unreasonably accumulate, but I am quite confident that if Your Honor sat here instead of there you would feel we were not doing our duty to our client unless under that blanket allegation we negative this possibility of unreasonable accumulation.

The Member: Don't misunderstand me. I am not criticizing you or anybody else. I am seeking to get in my mind what the mode of thought is upon which I must proceed in considering this evidence.

I want your thought about that. I am not suggesting or even intimating that you should not do this. I want to know the theory upon which you are proceeding; that is, as one lawyer to another.

Mr. Welch: As I have said to Your Honor, I cannot, as the pleadings stand, I cannot take my seat and think I have done my job without at least attempting to prove, if Your Honor will or will not permit, at least attempting to prove we did not unreasonably accumulate.

My own theory is that the Commissioner's action and the present case in court leaves this issue open, and I am confident that if you ask my enemies they will say to you that they intend to argue with the utmost enthusiasm that we have unreasonably accumulated surplus.

The Member: I am going to give them the opportunity to make that argument, and I hope it will be at the close of the trial in this case because I don't want the case to be submitted without knowing more than I do now, after three days, as to what the posture of the case is.

I am just taking this opportunity to get your view for the support of this type of evidence you are now intending to put in.

Mr. Welch: Well, only there is one other word that I could say; there is, of course, the theory that the assessment by the Commissioner carries with it a determination of the necessary facts to support that assessment—

The Member: But this is not a necessary fact to support that assessment. This subdivision (b) seems to me not to be a necessary fact at all. It may be a fact.

The Commissioner may determine it and if he determines it then it is a prima facie case unless you disprove it, but he hasn't determined it. He just has said that 104 is applicable, and all 104 does is to say that if the surplus is not distributed or corporations availed of to enable the stockholders to escape surtax, he has got to assess 50 percent. That is all he has determined.

The statute says something more, in certain circumstances.

Mr. Welch: I know, but here we stand, if Your Honor please: It would be a pleasure to me to walk out of the courtroom feeling that neither the accusation we are a mere holding company or we have unreasonably accumulated had never been made, and, therefore, never had to be met, but it is so suspended in the air, as I say, I am uncomfortable without putting in my evidence.

The Member: Do you object to the witness, Mr. Clark?

Mr. Clark: Yes, sir; I object to him on the ground of lack of qualification.

The Member: I will overrule the objection despite all the qualms I have as the correctness of your view.

Mr. Clark: Will you note an exception, Your Honor?

The Member: Yes.

Direct Examination (Continued).

Q. 87. (By Mr. Welch). Mr. Blough, may I ask you whether or not you have examined the stipulation of facts on file in this case, and the exhibits attached to it? A. Yes, sir; I have.

Q. 88. Have you been present in the courtroom throughout the trial and heard all the evidence that has been introduced? A. Yes, sir; I have.

Q. 89. Have you, at my request, made a study of the financial history of the taxpayer, the Maine Company, as contained in this stipulation and in the evidence with a view to testifying here? A. Yes, sir.

Q. 90. May I ask you, Mr. Blough, when you first undertook to make your study? A. Last October.

Q. 91. Now, as a result of your examination and study of the stipulation and exhibits attached thereto and as the result of your having heard and considered the evidence that has been introduced so far in this trial, have you an opinion, Mr. Blough, as to whether or not the gains or profits of this

taxpayer, the Petitioner, were, in the year 1930, permitted to accumulate beyond the reasonable needs of the business? A. Yes, sir; I have.

Q. 92. What is your opinion as to the year 1930? A. That the gains and profits of the taxpayer were not allowed to accumulate beyond the reasonable needs of the business.

Q. 93. Have you similarly formed an opinion as to the year 1932? A. Yes, sir.

Q. 94. Will you state your opinion as to that year? A. The same as for 1930; that they have not been allowed to accumulate unduly.

Q. 95. And have you similarly formed an opinion as to the year 1933? A. Yes, sir.

Q. 96. And what is your opinion as to that year? A. The same.

Q. 97. Are the reasons, Mr. Blough, which led you to the opinion you have expressed, substantially the same as to each of the three years? A. Yes, sir; they are.

Q. 98. Then, Mr. Blough, would you be good enough to tell us, if you will, the reasons that have led you to the formation and expression of this opinion? A. Well, when I first undertook to study this problem I attempted to study the nature of the business of the Maine Company and I found immediately that it was the top of a group of businesses that were centering around the Chicago Stock Yards at Chicago, Ill.

Those businesses, as shown by the record, constituted the stock yards itself; the steam railway leading into the yards and into the packing area, and into the area immediately surrounding and connecting with all of the railroads running into the city; an elevated passenger railway company serving with passenger service the stock yard area; a bank that serves the stock yard district; an electric generating company that serves the stock yards area with power, electricity,

and a real estate development company; a trust which has as its primary duty, primary aims, apparently, from its history, from testimony, the development of the area in close proximity to the property of the steam railway company for the purpose of increasing tonnage.

These businesses all are tied together and the majority of them at one time were all in the one company, the Transit Company, which is the company that owns the stock yards themselves.

From time to time the separate phases of the business were separately incorporated.

These all head up in the Maine Company and yet there is a unity of enterprise there which runs through the whole thing, centered in the Maine Company.

The principal assets of the Maine Company during 1930 to 1933, inclusive, were the stock of the Jersey Company, an intermediate holding company between the Maine Company and certain of the subsidiary companies—

Mr. Clark: Just a moment, if I may interrupt. This, of course, is simply the conclusion of the witness from his study of facts which he has presented to him; is that correct, Mr. Witness?

The Witness: That is right.

Mr. Clark: Not to be taken as factually accurate.

The Member: The witness is not being offered to testify to any facts, is he?

Mr. Welch: As I thought I indicated, purely an opinion witness now being asked to state the basis for his opinion.

A. (Continuing) In addition to the stock of the Jersey Company, the Maine Company also owned the stock of the Produce Terminal Corporation that owned the power plants. It had some substantial cash and notes and investments, and it also had a contract with the public stockholders of the New Jersey common stock, not held by the Maine Company, by

which it guaranteed 9 percent dividends on the common stock of the New Jersey Company in the hands of the public and received everything over that that the New Jersey Company might earn.

Now, the relationship between the Maine Company and these underlying companies is such that aside from the cash and securities and loans, all of the assets of the Maine Company were dependent for their value upon what was done underneath, in the subsidiary companies.

The companies that might be called, for brevity, the operating companies, although in fact, the two companies, the Railway Company and the Railroad Company did not actually operate but you might save time in referring to them to call them the operating companies, and these companies were the source of practically all of the income of the Maine Company, it getting very little income from these other assets that it held.

The assets of the New Jersey Company were—I meant the stock of the New Jersey Company—was the principal asset of any value to the Maine Company, and, accordingly, it would appear very obvious that the primary duty of the Maine Company would be to see that the operating companies down below that were responsible for feeding the income through to it, were properly maintained and operated so that they might continue to be profitable and increase in their profitableness, and it has seemed to me that the testimony has borne out the assumption that that would be the primary thing that they would be interested in.

When you look at the Maine Company and the operating companies you find that the link between the Maine Company and these sources of income, with the exception of the small amount from the Produce Terminal Corporation and whatever might come up from the bank and the Pau Corporation, the major part of it was tied into the Maine Com-

pany through a connecting link, which was the New Jersey Company, an intermediate holding company.

I say that, just using general colloquial language. I don't attempt to use anything that might have a legal technicality in that description. I am merely saying that it is a company that does, apparently, nothing but hold the securities of these other companies and takes them to the Maine Company.

Accordingly, when you are attempting to determine what the position of the Maine Company is, you must turn immediately and examine the New Jersey Company to see what its condition is and what its situation is. And when you turn to that, the first thing that is notable is that it has a large issue of bonds outstanding, $14,000,000, had at this time, and that those bonds will fall due in 1940. Moreover, you find that the charter of the New Jersey Company is going to expire in 1940. That means that the New Jersey Company is going to meet some kind of a major crisis in 1940. It has $14,000,000 of its own bonds outstanding; it has guaranteed something over $2,300,000 in bonds of the Railroad Company; and it has guaranteed something over about, at the end of 1933, it was exactly two and a quarter million of the Central Manufacturing District bonds, making a total of something over eighteen and a half million dollars that the New Jersey Company was going to have to do something about in 1940. Its own bonds were falling due. The guarantees had to be protected.

Now, knowing that, you immediately look to see—I immediately looked to see what the New Jersey Company might have to take care of that situation, and I found that practically all of its assets except the certificates of beneficial interest in the Central Manufacturing District, and a very small amount of the Transit stock, and a very few other odd items, practically everything that it had of value aside from

those, was pledged on this 14 millions of bonds. The Transit Company's stock was pledged all but a few shares, as I have said.

The stock in the Railway Company was pledged, and two and a half million of bonds of the Indiana Harbor Belt Railroad Company were pledged. Now, it seemed to me, in attempting to put myself back in 1930 to '33, that with this crisis ahead any management that failed to consider that crisis would be unwise. And so I attempted to determine what action should be taken in 1940 and what would happen if the obligations were not met. Obviously, if the bonds were not paid off, the trustee would foreclose on the collateral. In addition to that, the bonds of the Central Manufacturing—I mean, the shares of the Central Manufacturing District would undoubtedly be impounded to take care of the guarantees and any deficiency that might grow out of the collateral on the bond issue. If that would happen the link between the Maine Company and these operating companies would be broken, and the Maine Company would be left with nothing in the way of a business enterprise, having only the cash and marketable securities and loans with the Produce Terminal Corporation stock and the bank, would be entirely out of the stock yards picture so far as its control over it or any income from it or any interest in it was concerned.

Now, that means that the Maine Company must provide for 1940. It would be financial suicide for it not to. Now these obligations, as I have said, were the obligations of the New Jersey Company, and the New Jersey Company had very little to meet it. The question arises immediately as to why the New Jersey Company didn't have funds with which to meet these obligations; why the funds weren't in the New Jersey Company. Well, the evidence indicates that the New Jersey Company was by-passed so far as the income of the operating companies was concerned. It never actually

got hold of any of the dividends from the operating companies after this agreement was entered into between the Maine Company and the stockholders of the New Jersey Company.

Q. 99. In what year, Mr. Blough?

Mr. Clark: I wonder if we might recess for a few moments?

The Member: Yes.

(There was a short recess taken.)

Q. 100. (By Mr. Welch). Would you like to have just the last of what you said read to you? A. Please.

(The record was read as follows:

"Well, the evidence indicates that the New Jersey Company was by-passed so far as the income of the operating companies was concerned. It never actually got hold of any of the dividends from the operating companies after this agreement was entered into between the Maine Company and the stockholders of the New Jersey Company.")

A. (Continuing) That was October 1, 1914. So that the New Jersey Company as it stood in 1930 to 1933, inclusive, had practically nothing it could turn to to obtain any funds with which the company could take care of this obligation which was falling due. All that it could possibly have had was about, well, the end of '33, there was about $200,000 in cash, and they had these railroad bonds of, I think it was, two and a half million. So in order to find out what can be done in 1940 to take care of these obligations, it is necessary to look to some other source than the New Jersey Company.

Now, the policy as shown by the evidence here, figures in the stipulation, has been to push the cash up to the top company. Now, when the parent takes from the children the earnings that they make, when they are in danger of starvation of any kind, it is necessary for them, in turn, to look to the parent, and that is just exactly what the situation is here.

If we are going to find out what its means are of taking care of this obligation, we have got to look to the Maine Company, which is the parent.

When we look there, we find that as of the end of 1933, and while the figures differ from year to year throughout this period, yet they are substantially in the same general nature, and the relationships are very much the same. At the end of 1933, the Maine Company had in cash and notes and marketable securities between 13½ and 14 million dollars, depending on what they might have been able to get out of these marketable securities.

Now, if you add to that the 2½ million dollars of the Indiana Harbor Belt Railroad bonds that were held by the New Jersey Company, and a couple of hundred thousand dollars of cash that the New Jersey Company had, you would still only have about 16½ million dollars, and if you scrape bottom on the cash drawers of all these subsidiaries throughout the whole system, you would only get a little over a million dollars more, which would have left them with, by scraping up every resource that there was in the system, only about 17½ million dollars to take care of this 18½ million dollars in 1940.

But since the New Jersey Company's charter is going to expire in 1940, it seemed desirable to look at the picture of the New Jersey Company and see what ought to be done. Is it just necessary to have money enough to take care of the bonds and the guaranteed obligations, or is there something else that should be done? And it seemed to me that had I been in the position of the management at that time, and it seems to me now, that the wise thing to have planned for and to be planning for is to liquidate the New Jersey Company in 1940. In the first place, it doesn't perform any economic function. It doesn't do anything. It is just a conduit from the lower companies to the top company. In the second

place, it is a taxpayer; it is an extra taxpayer in the chain, and is faced with the problem of meeting personal property taxes in the State of its incorporation.

Further than that, in 1940, for the first time, it will be possible to go out and get all of this preferred stock at par. It is a 6 percent preferred stock, and it has been selling above par most of the time as the evidence shows. Since this company had any money, or since this enterprise had any money that it could have gotten hold of the preferred stock, the preferred has been selling above par. It is not possible to get that at par other than the bare chance that the market might go down below that, and the conditions in '30 to '33 didn't give any indication that that might be the case.

With the possibility of buying up the preferred stock at par, and the fact that this is an intermediate holding company, now it is noticeable that the subs of this New Jersey Company are, with the exception of the Central Manufacturing District, public utilities subject to regulation of a public utility body. The stock yards themselves are subject to the regulation of the Department of Agriculture, and the Interstate Commerce Commission in their charges. The Railway Company, the other large income producer, is subject to the Interstate Commerce Commission. True, that company's properties were under lease to the New York Central, but the Interstate Commerce Commission, as shown in the evidence in this case, indicates that the Interstate Commerce Commission has held its approval of this rental open and reserves the right to open it at any time. Intermediate holding companies—in fact, all holding companies and public utility enterprises—

The Member: What evidence is that that you are talking about?

Mr. Welch: It is in one of the exhibits which has not been

read into the record. It will be shortly called to Your Honor's attention. Mr. Green will give Your Honor the exhibit in a moment.

Mr. Green: Exhibit No. 13.

The Witness: During the period—

The Member: You mean a stipulation exhibit?

Mr. Green: Petitioner's Exhibit No. 13.

A. (Continuing) During this period, '30 to '32, there was a great deal of talk about public utility holding companies. The Federal Trade Commission was investigating holding companies and reports were being made—officials of States and the Federal Government were making considerable over it as a matter of common knowledge. So that that added to these other factors seems to indicate that in 1940 it would be wise to get rid of this intermediate holding company which performs no real function.

Now, suppose you want to get rid of that? What is it going to be necessary for them to do? Well, they are going to have to meet these obligations of better than 18½ million that were previously mentioned—that is, the bonds and the guarantees. On top of that, there was about 6¼ million of preferred stock outstanding, which they would have to pay off or make some other kind of a settlement with by distribution in kind. And there was common stock outstanding which it probably would have taken from three-quarters of a million dollars to buy at that time, because if that company were liquidated, the common stockholders could demand an appraisal of the stock; and unless there was a distribution in kind, and so it would be necessary to take care of them.

I think it would be highly undesirable to consider a distribution in kind because that would mean that the stocks of these operating companies would, to some extent, become in the hands of minority stockholders. Any person who is familiar with holding company operations of a subsidiary

company knows that the minority stockholder problem is a real problem on many occasions when questions of policy are involved. So that it would look as though the thing that they ought to plan on to get a completely sound picture would be the 18½ million of obligations previously mentioned, and the 6¼ million of preferred stock, and approximately a million dollars for the common stock, which would run up somewhere in the neighborhood of twenty-eight to twenty-nine millions altogether.

Now, as I previously indicated, the maximum that there was in the system that they could get hold of to make any payments at the end of 1933 was between seventeen and eighteen million dollars, which still leaves them some ten million dollars to go. Now, it seems to me that a company that has substantial obligations outstanding that must be met, that it cannot be said to have acted unwisely or unnecessarily in the accumulation of funds until it has provided enough to meet those obligations; and when the sound program indicates that they are still short about ten million dollars, at the end of 1933, it seems to me doubly so.

Q. 101. Have you now given us the bases of your opinion, Mr. Blough? A. Well, I have given you the bases of my opinion as they can be supported by the tangible facts and figures in the record. Of course, any person, any business man who is attempting to make a judgment as to a financial policy, has to take into consideration some other things that are not so tangible in their nature, and I tried to give consideration to those as a check on the conclusions that could be drawn from the actual facts and figures, and it seemed to me that those, what I might call intangibles, bear out the conclusions that you arrive at from a study of the figures.

Q. 102. To what do you refer by the term "those intangibles"? A. Well, there are a number of things. In the first place, it must be remembered that from '30 to '33 was a

period of depression in this country, and all business men of foresight, I think, would have been very conservative about distributing or letting go of any resources that they might have during that period of time. The future was pretty much of a blank. There was a great deal of fear about what the future might be, and most companies were conserving their resources during that period. It was impossible at that time to tell how long this depression might last. It was impossible to tell what kind of a market they might have in 1940 in case they attempted to do any kind of refinancing or were forced into any kind of a refinancing instead of paying off their obligations.

And I might say, it is still somewhat doubtful as to what they are likely to face at that time. And there is one thing sure, that in any kind of a financial deal of that kind, money really talks. If you have got the cold cash, you can make deals that you can't begin to consider if you don't have it.

Then it seemed to me it was necessary to consider what the possibilities were of the earning power of this enterprise being interrupted. As I said before, the earnings of the enterprise were derived largely from regulated public utilities. The Central Manufacturing District, which is not a public utility, and about the only one in there that isn't, didn't furnish any income to the enterprise because it never did pay dividends. The Union Stock Yards and Transit Company had rates that were fixed by a public body. During those years there was much talk about the difficulties of the farmer. One of the expenses of the farmer in marketing stock was the expense that this company charged for the services of live stock shipped into the packers.

Considering the general attitude there, it certainly was something to make one pause in considering what the Department of Agriculture might do with the rates there for the benefit of the farmers. You also had quite a bit of agita

tion throughout the country among the electric utility regulatory bodies as to demands for reductions in rates by rate payers, and rates were being cut. There was nothing to indicate that the Produce Terminal Corporation might not have its income reduced in that way. The Interstate Commerce Commission, considering loading charges of the Railway, was in position to make the services performed for the railways unprofitable or much less profitable than they were at this time.

Then, too, there was the question, as the testimony indicates, of the possible competition of the packers, themselves, in building up outlying stockyards, buying directly, and bypassing the stock yards themselves. I think there was a booklet introduced by Respondent which shows the downward trend in the receipts of live stock at the yards. All of that would have an effect on the income, and in looking forward at that time, it was necessary to consider the possibility that that income might be significantly reduced.

Then you have the problem of the New York Central lease. It is true that was a lease that paid $2,000,000, and barring action by the Interstate Commerce Commission, or a receivership, it was good for $2,000,000. But in 1930 to '33, particularly in '32 and '33, the situation of the railroads of the country was, to say the least, precarious, and there was no assurance that this company might not go into the hands of a receiver or even that there might not be Government ownership, in which case it is entirely possible that this lease might have been thrown out.

Now, testimony indicates that these enterprises have devoted a great deal of attention to building up tonnage for this railroad. They had a 99-year lease, or was it a 999-year lease? Anyway, they had a very long-term lease with the Railroad Company. Why be afraid or why find it necessary to spend a lot of money building up tonnage for the Rail-

road Company? Obviously the only reason was that they felt it was necessary to increase the importance of that Railway Company and its tonnage for the purpose of assuring that there would be no cancellation of the lease. If there was no danger of a cancellation of the lease, there was no occasion for building up tonnage, because the lease was fixed. But if the lease became unprofitable, the I. C. C. might step in at any time and decide to cut the rental, or a receivership would let it go.

Now, suppose the lease were given up? It is very doubtful whether the Railway Company, itself, could have made that piece of property as valuable as a railroad company with a long haul attached to it, because that long-haul railroad company is in position to feed through this little railway substantial revenues to the long haul. So if it isn't worth $2,000,000 to a railroad company so that it might give it up, it certainly wouldn't be worth anywhere near that to the little railroad itself operating on its own hook. In addition to that, it would be necessary for the steam railroad—that is the company we call the Railway Company—to get some capital with which to equip itself to handle the railroad in case the New York Central gave it up.

Now, if you follow—if you assume that the trend of earnings is going to continue and the trend of accumulations is going to continue on beyond 1933 and 1940 at the same rate that it accumulated from, say, the middle of the '20's up to 1933, they still would not have amounted to more than enough at least to take care of the situation in 1940 in its complete program.

Now, if in addition to that you have to discount the possibility of earnings from this period on to the date when they are meeting their crisis, they are still less likely to be available at that time, and a further necessity of it maintaining a substantial amount of cash in the enterprise.

Q. 103. Mr. Blough, did you give consideration to the dividends paid by the Maine Company in the study that you made of it? *A.* Yes, sir.

Q. 104. Did you form an opinion as to whether or not the dividends paid by the Maine Company in the years 1930 to '33, inclusive, were reasonable dividends under the circumstances? *A.* Well, to decide whether a dividend is a reasonable dividend or not, it is necessary to take into consideration, first the rights of security holders to a distribution of profits, and, second, the needs of the business. I have already covered the needs of the business to indicate that it seemed to me that there was very good reason for maintaining the funds in the business.

Now turning to the needs of the security holders, in this particular case there was only one and whether he got sufficient or more than sufficient for his livelihood was a question that he was in a position to answer in this case.

The Member: What corporation are you talking about?

The Witness: The Maine Company, Your Honor; the only money they really had to declare outside as dividends except, of course, the regular dividends to the public on the New Jersey shares preferred and what common was outstanding. *A.* (Continuing) Now, to look at this dividend policy from the standpoint of a general corporate dividend policy, I tried to look at it from the standpoint of what you would have looked at it if you had been a public holder; I mean a group of public stockholders rather than just one; and in looking at the dividend policy we find that all during this period a 5 percent dividend was regularly paid to the stockholders, and it seems to me that even had there been a large number of public holders, that amount of regular dividends, year in and year out, could not have been considered unfair to them in that it did give them a regular return on their investment, which is the thing they buy for and what

they depend on and when you couple those two things with the needs of the business it seemed to me that the dividends were not exorbitant.

The Member: Not exorbitant?

The Witness: Well, let me say that it seemed to me that the dividends were reasonable.

No, "exorbitant" was not the word; that the dividends were not unduly low, I should have said; the amount retained out of the earnings was not exorbitant, was what I should have said.

The Member: May I interrupt?

Mr. Welch: Certainly, Your Honor.

The Member: Can you make your statement in respect of the distribution of dividends in the light of the fact that the shares were not held, as you assume, by what you call the general public or a group of shareholders, but were, in fact, held by one person? How does that affect your reasoning, or what is the reasoning to be applied to that situation that existed rather than to the hypothesis that you assumed?

The Witness: Yes; I see your point, Your Honor.

I think the fact that the stock was all held by a single stockholder places the determination of the reasonableness of the dividend to a much greater extent on the basis of the needs of the business rather than the needs of the security holder, so that the needs of the business would be the primary thing to take into consideration, here.

I was trying to—

The Member: Suppose you elucidate that. It is not at all clear to me, as to what you mean.

The Witness: Where you have a group with demands for funds in the business, and also a responsibility for a distribution to security holders, the problem of the reasonableness of the dividend, it seems to me, is one of a somewhat fine balance between those two needs.

The Member: Now take your factor which you have stated of the responsibility for a distribution to the shareholders. What do you mean by that?

The Witness: I conceive of a responsibility for distribution to the shareholders to apply primarily to a corporation where there is a holding of the securities outside of the management.

The Member: This was not such a corporation.

The Member: Then you eliminate that imaginary situation and take the situation as it is and tell me what you mean by the responsibility of the corporation to the shareholder when the shareholder is one?

The Witness: Since the shareholder is one, and there is no public interest to consider, then it seems to me that the balance between the shareholder and needs of the business is very much displaced, and that about the only thing that needs to be taken into consideration is the needs of the business because the individual security holder who is part of the management is in a position to see that he gets enough to live on and in deciding whether he has used wisdom or not in the distribution of the funds of the corporation you are forced to look almost exclusively at the needs of the business.

The Member: So that there is no such thing in this particular case as the factor of responsibility for distribution?

The Witness: A reasonable dividend; yes, sir.

The Member: There is no such factor, is there; that everything you have said about that we can completely ignore, can't we; everything you have said as to the ordinary factor, where you have a group of shareholders doesn't apply to this case, and, therefore, there isn't any such factor to be considered?

The Witness: Well, it doesn't apply, but I felt it was necessary to show why it doesn't apply here by indicating

what your general measure of the reasonableness of the dividend may be.

A. (Continuing) There are a very few others of these somewhat intangible factors that I wanted to mention, and that is the possible needs for other funds for such things in the industry other than those that are tied in with this 1940 situation.

As the record shows, the history of this enterprise is replete with situations where it was necessary to have additional money: The packers in 1890; the packers again in 1907; the necessity of coming into the Armour picture during this period under consideration; the necessity for furnishing the Central Manufacturing District during this 3 years, or during the period—yes, these three years—was about $1,600,000; the fact that, as the testimony shows, the management of these operating companies was making demands on the top company for additional funds, Mr. Leonard urging funds for concrete hog houses; Mr. Hackett estimating $1,000,000 to $5,000,000 that would have to be furnished for the development of the Central Manufacturing District, and so on, all must be taken into consideration in figuring what you are going to have in 1940. You can't tell what might lie ahead.

For example, in 1927 and 1928 no sane person would have ever thought of this enterprise having to pour $10,000,000 into a bank in the stock yards area to save it, yet there was something that had hit them suddenly and those unpredictable circumstances are things every business man has to provide for and anticipate, to some degree.

Q. 105. (By Mr. Welch). Mr. Blough, you have been talking about the dividend of the Maine Company and I would like to have you point out for us, if you will, whether or not that dividend to the stockholder or stockholders of the Maine Company is the only dividend that leaves the whole enter-

prise? A. No; in addition to the dividend that goes to the stockholders of the Maine Company, you also have the dividends going to the preferred stockholders of the New Jersey Company, and those shares are held almost in their entirety, during this period, by the public, and also the dividends of 9 percent on the common stock that was held by the public. I think that totals, each year during this period, somewhere in the neighborhood of $400,000 to $450,000.

Q. 106. Now, Mr. Blough, there is just one other thing I want to mention to you: You testified that the Maine Company has withdrawn steadily from the subsidiaries their earnings, or something to that effect, did you not, sir? A. That is right.

Q. 107. Have you had prepared, or prepared under your direction, a chart that shows the withdrawals of the earnings of the subsidiaries by the top company? A. Yes, sir.

Q. 108. Is this that chart, Mr. Blough (indicating a chart)? A. It is.

Mr. Welch: This I shall want to offer as a chart of what he will now testify to, and I should like to offer it. It is just a chart showing the withdrawals.

(The chart so offered and received in evidence was marked "Petitioner's Exhibit 40," and made a part of this record.)

Mr. Welch: Mr. Clark, I am handing His Honor a smaller chart.

Mr. Clark: Yes.

The Member: Is this a replica in miniature of that, Mr. Welch?

Mr. Welch: It is, if Your Honor please.

The Member (Referring to document in his hand): Wouldn't this be a better exhibit than that?

Mr. Welch: We have some large exhibits already in evidence, and I would be pleased to have the larger go along.

I will put in two or three of the littler ones, if you would like me to.

The Member: I was just thinking of the file. We can fold this one up and put it in the file, and when you come to take an appeal you have an easy thing to put in your transcript of record on appeal.

What are you going to do with that (indicating the large chart)?

Mr. Welch: If Your Honor please, the map, for example, I think may be of help to other members of the Board than yourself, and it is large and if—

The Member: We could fold that but these backed things would be difficult to handle.

However, we have got to put up with whatever you think is a proper exhibit in your case.

Mr. Welch: If the unhappy situation comes that I take up the case to a higher court, I could try to adjust with counsel whether we take up the framed exhibits or something else.

Q. 109. (By Mr. Welch). Calling your attention to this chart, will you explain to use what it shows? *A.* The solid black line on the chart shows the net earnings of the New Jersey Company, its wholly-owned subsidiaries and their wholly-owned subsidiaries and wholly-owned subsidiaries of the Maine Company.

The line with the dots in it represents the distributions by the above-mentioned companies to the Maine Company and to other preferred and common stockholders of the New Jersey Company.

This chart was prepared from figures that are contained in the stipulation.

Q. 110. And is there anything you would like to point out to us that— *A.* It might be noticed that in 1932, the solid black line makes a peak upwards. It should be remembered, in studying the chart, that in that year there was included in

the earnings the $2,426,433.29 of impounded re-weighing charges of the Transit Company for 1921 to 1931, inclusive, which were released in 1932 and were treated as income on the books in that year.

Q. 111. Have you anything to say to us, Mr. Blough, about the general path of the lines from 1922 on to the end of the chart? *A.* Well, it will be noticed in studying the chart that from 1922 to the close of 1933 the distributions and the earnings are not very close together, and, as a matter of fact, the figures back of the chart reveal that from 1921 to 1933, inclusive, the distributions as shown in the dotted line exceed the earnings as shown in the black line.

Mr. Welch: You may inquire, Mr. Clark.

The Member: Weren't these figures that we had on the first day, which included this $2,400,000 of impounded funds, didn't they go down into the red figures in 1933?

Mr. Welch: Yes.

The Member: Now this exhibit shows in 1933 only an approximate zero. As I remembered it, the figure was a million dollars below zero, isn't that right?

Mr. Green: That was the figure of the Transit Company alone.

During that year other companies earned money, so that it came up closer to zero.

The Member: The figures we were considering on that day were the figures of the Transit Company?

Mr. Green: The figures of the Transit Company alone.

The Member: And this is the figure of the New Jersey Company?

Mr. Green: The figure of the New Jersey Company and all of the other companies.

The Member: This is the New Jersey, isn't it?

Mr. Green: It is the figures of the New Jersey and all of its wholly-owned subsidiaries which include the Transit.

Company, the Railroad, the Railway, and the District, and also income from the Produce Terminal; in fact, the figures of the whole enterprise except earnings of the Maine Company from sources other than the enterprise.

The Member: So that the figures of the group shown by this black line—this chart is different from what it would be than if you made a chart of the Transit Company?

Mr. Green: Yes.

The Member: And that deficit of the Transit Company, then, was absorbed by the earnings of other companies; is that right?

Mr. Green: That is correct.

Mr. Clark: May I have just a moment, Your Honor?

The Member: Yes.

Let me ask another question: I suppose it is in the stipulation, and that is probably the reason it is not in my mind at the moment, and that is: What has the evidence shown as to the actual amount of accumulated and undistributed earnings of the Maine Company during the taxable years? Does that appear?

Mr. Green: Those figures are in the stipulation.

The Member: Would you give me an idea as to what they were? I don't ask you to make a definite statement.

Mr. Green: The Maine Company's income, if you treat it—I take it you mean the Maine Company's income?

The Member: I am talking about only this Petition.

Mr. Green: Yes.

The Member: What was the accumulated earnings, in what percent, to indicate the application of 104, because they weren't distributed?

Mr. Green: That appears in S-51 attached to the stipulation. It shows that the Maine Company's accumulations in 1930 were about 2½ million; in 1932, about $1,700,000; in 1933, about $1,800,000. Now, of course, the Maine Com-

pany's earnings in that year would be greater than the earnings of the system—in the year 1933, for example, would be greater than the system because they withdrew money in the form of dividends that weren't earned by the rest of the system in that year.

The Member: These accumulated earnings are over and above the distributed 5 percent; is that right?

Mr. Green: That is right.

The Member: Would you rather suspend now until 2 o'clock than you would to go on for 5 minutes?

Mr. Clark: I believe that would be helpful, Your Honor.

The Member: Suppose we do that.

Instead of coming back at quarter after two we will come back at 2 o'clock.

We will adjourn now until 2 o'clock.

(Whereupon, at 12:40 o'clock p. m., a recess was taken until 2 o'clock p. m. of the same day.)

Afternoon Session.

The Division resumed hearings at 2 o'clock p. m., whereupon the following proceedings were had:

Mr. Clark: May I ask your indulgence for a moment, Your Honor?

The Member: Yes.

Mr. Welch: Could I have the witness one moment, Mr. Clark?

Mr. Clark: Well, there is only one question that I had in mind. I am not sure whether something which is marked on my copy as Petitioner's Exhibit 41 was offered in evidence.

Mr. Welch: Apparently that is 40 you are referring to, this large chart.

Mr. Clark: Forty?

Mr. Welch: Yes.

Mr. Clark: Was it offered in evidence?

Mr. Welch: It was. It was marked.

The Member: Is that true, Mr. Clark? It has been marked?

The Clerk: It has been marked "Exhibit 40."

Mr. Clark: I would like to know what the record says relative to that.

The Member: I can't recall the formulation of an offer. I confess that there was a lot of talk about whether that sheet should be the one which goes in evidence, or this one, apparently upon the assumption of everybody that we were talking about something that was going in evidence.

Are you talking about an opportunity to simply object; is that the idea?

Mr. Clark: I would like to object, yes, Your Honor.

The Member: Well, I think that there wasn't such an offer as would have given an opportunity to object, as I recall it.

Do you remember, Mr. Welch?

Mr. Welch: I never trust my memory. My impression was that I offered it and that Your Honor then began to talk about the size of it, but that is pure impression. I am distinctly of that impression, but I am not sure.

The Member: Well, I will hear the objection, if there is one, or a motion to strike, if that is what it is. All I am concerned with are the reasons to see whether it should be excluded.

Mr. Clark: Your Honor, my objection is this: That there is no supporting data for this chart. I had never seen it before. Nothing was offered in support of it, and, consequently, I object to the chart.

Mr. Welch: I will ask Mr. Green to answer the objection, if he will.

The Member: What is the supporting data, Mr. Green?

Mr. Green: Every figure in that chart appears in the

stipulation of facts and exhibits attached thereto filed in this case. I have with me an analysis, item by item—

The Member: Well, perhaps it should be left to the witness to say upon what basis this chart was prepared.

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having heretofore been first duly sworn was recalled to the stand, and was examined and testified as follows:

The Member: You prepared it, did you not?

The Witness: It was prepared under my direction.

The Member: Yes.

Well, now, you say in your own way where you got the data that is shown by this chart?

The Witness: All of the data of this chart was taken from the information in the stipulation, or, rather, in the exhibits that were a part of the stipulation numbered "S" with some number, and they were combined and added together as indicated in my statement of what they represented to produce the totals which are represented in the chart. They can be reconstructed entirely from information in it.

Mr. Clark: Well, that is what I will have to go through this afternoon, Your Honor. I am sorry.

Mr. Welch: It is quite all right.

Now, could I ask him one more question before you take him for cross, sir?

Mr. Clark: Yes.

Direct Examination (Continued).

Q. 112. (By Mr. Welch). Mr. Blough, is there some correction in your testimony of this morning that you would like to make? *A.* Yes, I would.

Q. 113. What is that correction, sir? *A.* I think I stated at one place in my testimony this morning, that the New Jersey preferred stock was selling above par throughout this period, and the fact of the matter was, according to the

record, that the New Jersey preferred stock was selling below par during certain years, particularly '32 and '33 of the period under consideration.

Q. 114. Does this correction in your testimony in any way affect the ultimate opinion that you have expressed? A. No, sir. It was merely an incident in that testimony.

Cross-Examination.

X-Q. 115. (By Mr. Clark). Referring to this chart which has been marked, I believe, as Petitioner's Exhibit 40, do you have a copy of that before you? A. Just a moment, please.

(The witness searches for document.)

A. Yes, sir.

X-Q. 116. Now, was this made up under your direction? A. It was—yes, sir; it was prepared under my direction.

X-Q. 117. And from what sources? A. From sources that are in the stipulation.

X-Q. 118. And will you refer relative to 1911 as to what sources in the stipulation you refer to? A. For the year 1911 there is included first a figure with respect to the Transit Company; the net income per S-5 of the stipulation less dividends from Harness & Saddlery per S-5 of the stipulation, and I might say, for the benefit of this whole line of questioning, that what I say here will apply to every year that is shown on the chart.

The next item related to the Harness & Saddlery net income per S-5 of the stipulation—

X-Q. 119. Well, now, just a moment. I would like to have you identify these items, if you will.

(Documents were handed to the witness by Mr. Green.)

A. All right.

X-Q. 120. I would like to have you start with 1911 on this chart, when this chart starts. A. Very well.

1911—the sheet, or, rather, Petitioner's Exhibit No. 40, the black line where the net earnings are graphed is graphed at a point which represents $1,868,718.09.

X-Q. 121. Yes, but on what basis was that graph charted? *A.* On the basis that one of these spaces on the graph represents a million dollars.

X-Q. 122. I don't understand that. May you explain? *A.* Well, in graphing the line on the chart, if there should be a million dollars of net income, the graph would come on the line, the horizontal line marked "$1,000,000." If there should be $2,000,000 of net income at that time the line would be on the horizontal line marked "2,000,000," and so forth, so that this—

X-Q. 123. Now, may I interrupt? Did you refer to the stipulation of facts in regard to that? *A.* Surely. I was just about to give the figures from the stipulation.

X-Q. 124. All right. *A.* The actual putting it on the graph is a matter of measurement with a ruler to get the relative proportions of a million dollars per line.

Now, in arriving at that $1,868,718.09, which represents the beginning of this black line in 1911, it was made up of $2,192,513.53, the net income of the Transit Company, minus $4,333.57—pardon me; that is not right—minus $4,000, the dividends received by the Transit Company from the Harness & Saddlery Company as set forth in Exhibit S-3.

X-Q. 125. Now, that's for what year? *A.* 1911.

X-Q. 126. Now, will you turn to 1912—

The Member: Just a moment. What is your figure?

The Witness: That is just one of the figures that go to make up the million, eight hundred plus. I wanted to give the rest of them, now.

A. (Continuing) The net of those two figures, $2,188,513.53, the net income of the Transit Company, aside from the dividends from the Harness & Saddlery Company.

The next item which is in that total is $4,333.57, the net income of the Harness & Saddlery Company, according to Exhibit S-5.

The next figure is $280,980.20, the net income of the Railway Company, taken from S-8.

The next figure is the net loss per books of the Chicago Junction Railroad Company of $50,000 from S-12.

Then there is a figure, a red figure, deficit figure, of $601,980.09, which is the net income of the New Jersey Company, according to S-26, less—

Mr. Welch: If Your Honor please (addressing the witness) would you like to have Mr. Green's assistance in hunting those out for you, Mr. Blough?

The Witness: It might make it a little faster.

Mr. Welch: Would you mind, Mr. Green? It is slightly inconvenient for the witness to do it as he testifies.

That is, if it is agreeable to Your Honor?

The Member: Oh, yes.

A. (Continuing) That was a net income of $1,233,231.91 less the amount included in that income as constructively received from the subsidiary companies in the amount of $1,835,212, both figures shown in S-26, the net amount of which is a negative figure of $601,980.09.

The last item that goes to make up the total I gave is the net income of the Central Manufacturing District as set forth in S-34, in the amount of $46,870.88.

Now, in each of the years the figures that represent the totals graphed on that chart of net income are taken from those same columns in those same exhibits. All you need to do is run down the column and take the figure which is just below.

X-Q. 127. (By Mr. Clark). No. What I want to know is what you have done. A. Well, that is what I did. I took the figures from the exhibits.

X-Q. 128. From what exhibits? A. The exhibits I have been reading from, the Exhibits S-3, S-5, S-8, S-12, S-26, and S-34. And, later on, in the year 1916, when income from the Produce Terminal comes in, from S-14. Now, if you wish, I can go through with every year as I have gone through 1911.

X-Q. 129. Well, just a moment.

Mr. Witness, have you taken into consideration the adjustments that were made relative to 1930 to 1933? A. No, sir; I took the book income as shown by these exhibits that I have mentioned.

X-Q. 130. Do you have your computations available? A. Yes, sir; I have.

X-Q. 131. Do you have anything to which we might have access? A. I see no reason why a copy of this might not be in their possession to check.

Mr. Green: It is up to Mr. Welch. I don't know where he is.

Mr. Welch: I am right here, sir.

I see no reason why the Government should not have it. I think it is only fair that they should have it.

(A paper writing was handed to Mr. Clark.)

Mr. Welch: I take it, if it is supplied to you, that is sufficient without putting it in evidence, or would you rather it were in evidence?

Mr. Clark: Oh, well, I would just like an opportunity, Mr. Welch, to check it.

Mr. Welch: It can either be in evidence, or not, as you choose.

The Member: Tell me, Mr. Witness, I would judge from the perpendicular line at which the chart begins, marked "1911" that I would have thought that that meant the beginning of the year 1911, and that the space between the figure "1911" and "191" [*sic*] represented the period of a year.

The Witness: As a matter of fact, these spaces represent the distance between December 31 of each year, December 31, 1911, as the first balance sheet that is in the stipulation.

The Member: Now, am I to take the first perpendicular line, then, as being the date of December 31, 1911?

The Witness: Pardon me. I am sorry. I think I misspoke. I mean the line, perpendicular line numbered "1911" represents the income of the year 1911, and the space between 1911 and 1912 actually represents nothing. It is only the trend, the next place of any significance being the next perpendicular line which represents, then, the net income for the year 1912.

The Member: Well, then, the distance between these perpendicular lines is wholly immaterial?

The Witness: No significance. The distance between the horizontal lines is significant in that they represent millions.

The Member: Is it possible to attribute any significance at all to those distances between the perpendicular lines by reason of the fact that if you separated them further the curve would naturally be flatter?

The Witness: That is true.

The Member: And if you condensed them more the curve would be more pronounced.

The Witness: That is true, Your Honor.

The Member: That doesn't make any difference, however, for the purpose of the chart, does it?

The Witness: I didn't think so. It was merely set up for the purpose of giving what seemed to be a balanced chart.

The Member: What guided you in selecting these spaces? Anything?

The Witness: No, nothing at all, simply what seemed to

be about the right distance to make that chart but would be readily read in the court room.

The Member: No, but what is the right distance?

The Witness: Well, I don't know.

The Member: These charts are tricky things. I have made them myself. If you put the two ends of them close together, it looks as though you are in the Alps, and if you put the two ends of them far apart, it looks as though you were almost on a plain, and the visual effect is quite different. Now, I don't want to be fooled by the size and shape of this chart. If there is anything significant at all in it, I want to know what it is, frankly.

The Witness: Well, I am afraid that I will just simply have to say there was no real significance in the spacing of the lines on the chart.

The Member: Go ahead, Mr. Clark.

X-Q. 132. (By Mr. Clark). Have you given any consideration as to what this chart has to do with the dividend policy of the Maine Company? A. This chart was not prepared for the purpose of reflecting anything about the dividend policy—

X-Q. 133. Please answer the question. A. May I have the question? I am sorry.

(Question read.)

A. Yes, to this extent.

X-Q. 134. All right. Then to what extent? A. To the extent that this shows the way in which the earnings of the subsidiaries were pushed up to the Maine Company.

X-Q. 135. Well, now, will you explain that further? A. This chart, as you will see, indicates that the earnings from 1922 on of all of these subsidiary companies were paid out as dividends either to the outside security holders or up to the Maine Company. This does not show the dividends paid by the Maine Company, but it does show that the funds

were pushed up either to outside stockholders or to the Maine Company, and, therefore, it clearly reflects the fact that the Maine Company was getting during these years—it doesn't give any indication of how it was disposed, but it indicates that it was getting all of the earnings of the enterprise, and the fact that the Maine Company was getting all of the earnings of the enterprise has some significance on the desirability of the Maine Company distributing dividends.

X-Q. 136. You have referred to certain companies as subsidiaries of the Maine Company. What do you mean by that? *A.* Well, when I was talking about the subsidiaries of the Maine Company, I should have probably used the word "sub-subsidiaries" and "subsidiaries." What I mean is the companies that the Maine Company owns the controlling interest in, or the companies that those companies, in turn, own the controlling interest in. It is those companies that lie below the Maine Company and which the Maine Company by its ownership of capital stock is able to control.

X-Q. 137. In what category would you place the New Jersey Company? *A.* That is a direct subsidiary, and the subsidiaries of the New Jersey Company are the Railway Company and the Transit Company and the Railroad Company, and those I would call sub-subsidiaries of the Maine Company.

X-Q. 138. Under the control of the Maine Company? *A.* That is right.

X-Q. 139. Do you know whether or not the Maine Company owns voting control of the New Jersey Company? *A.* In the years in question the Maine Company did not own the full voting control.

X-Q. 140. Those are the years '30 to '33? *A.* That is right, because the voting power in the New Jersey stock

rests both in the preferred and in the common, and the Maine Company did not have enough so that if some other party had held all of the shares that the Maine Company did not have, it could have controlled. Under those circumstances the Maine Company could not have controlled, but it had such a large block in proportion to anyone else, the other securities being scattered far and wide, that it had control.

X-Q. 141. Can you tell from your research how much money the New Jersey Company reasonably expected to earn as between 1934 and 1940?

Mr. Clark: Just a moment. This is cross-examination.

The Member: Have you finished the question?

Mr. Clark: No.

Mr. Welch: Well, I think I should sit down.

X-Q. 142. (By Mr. Clark). (Continuing) Sufficient to retire its obligations by 1940?

Mr. Welch: Could I hear the question?

(Last question read.)

Mr. Clark: The question isn't happily framed, Your Honor.

X-Q. 143. (By Mr. Clark). —as to whether such earnings would be sufficient to retire its obligations by 1940. A. I did not make any study of the actual figures, but I took the trend of earnings during the period from 1920 on through the period 1930 to 1933 and estimated that a continuance of that trend would just about take care of the requirements in 1940 on the basis of the dividend rates in effect, assuming that there would be no unusual requirements for cash. I don't think those came out quite to the point of covering all of the requirements for a reorganization—I mean, a complete elimination of the New Jersey Company.

Mr. Welch: Could I say just a word?

The question, if I understood you, Mr. Clark, was put as to the Jersey Company, although it was put in two installations, and I am under the impression the witness has answered as if it were put as applying to the Maine Company.

Mr. Clark: Why don't you take care of that, Mr. Welch, on redirect?

Mr. Welch: Because it was an obvious error. You split your question and I was not sure myself whether you asked about Maine or New Jersey.

Mr. Clark: I asked about New Jersey, definitely. Ask the Reporter.

The Witness: I am sorry, Mr. Clark. I think that your statement is correct that that is what you asked, but I am frank to admit that in my answer I was covering the whole enterprise and I did not make any study of the individual situation of the New Jersey Company; the New Jersey Company itself was not in a position to accumulate anything during that period due to this by-pass contract which had been entered into back in 1914.

X-Q. 144. (By Mr. Clark). When you say "the by-pass contract," what do you mean? *A.* That is the contract that provided that these subsidiaries of the New Jersey Company should pay, as I remember the contract—it is in evidence—but as I remembered, it provides for paying to the trustees of the New Jersey bond issue the amounts necessary to pay the bond interest and, I think, it provides for the payment to a trustee of amounts necessary to pay the dividends on the preferred stock and the 9 percent dividends on the outstanding common stock, and that the rest of it shall be all paid to the Maine Company, and that the New Jersey Company should not get any of it.

X-Q. 145. When you say "these subsidiaries," to which companies do you refer? *A.* Those contracts related to

the Transit Company and the Railway Company, the Steam Railway Company.

X-Q. 146. Have you given any consideration to the relationship of a corporation named F. H. Prince & Company, Inc., or incorporated? *A.* I have paid very little attention to the company F. H. Prince, Inc. I have noted it and know its place in the picture.

X-Q. 147. Well, will you tell me what your opinion is of its place in the picture? *A.* Well, it has a peculiar place in that it has been created for the purpose of holding, as I understand it, 60 percent of the stock of the Maine Company, and, in turn, of having its shares held by a trust that was set up by Mr. Prince, of which Mr. and Mrs. Prince are at present, as I understand it, the trustees.

I am not informed as to the purpose and I don't see, immediately, any particular function of F. H. Prince & Company, Inc., except that it is just to hold those shares.

X-Q. 148. That is, in your opinion, it exercises no business function whatsoever—

Mr. Welch: Just a moment.

Mr. Clark: I am asking for the opinion of the witness.

Mr. Welch: On what? He was put on to testify as to the reasonableness or unreasonableness of the accumulations in the Maine Company and I so stated when I offered him. I did not ask any opinion of this witness of F. H. Prince & Company Inc., nor was that company mentioned by him.

Mr. Clark: It is in the stipulation of facts, Your Honor.

Mr. Welch: That is not the question. The question is, Are you examining on anything as to which he expressed an opinion, and I think you are not.

Mr. Clark: I ask a ruling.

The Member: I will overrule the objection.

A. Well, the only thing that I know that bears on the

business activities of Frederick H. Prince, Inc., is the provision in the trust indenture setting up a trust estate by Mr. Prince along in about 1932 which provides that certain beneficiaries of the trust are to participate in the work or the management of F. H. Prince & Company, Inc., and since F. H. Prince & Company, Inc., holds 60 percent of the stock of the Maine Company, I would assume that in time F. H. Prince & Company, Inc., might come to have a place of control-management over the Maine Company, but that is purely an assumption and I can guess it only from the document which is in evidence and which shows the trust indenture. I have no knowledge aside from that as to what its intention is.

X-Q. 149. (By Mr. Clark). You say that company, according to your recollection, was organized in 1932? *A.* I don't remember.

X-Q. 150. I see. *A.* I said the trust was set up in 1932. I don't remember whether the corporation was organized then or not.

X-Q. 151. Can you tell me, whenever it was set up, from your examination, it has any responsibility for the conduct of the affairs of what we call the Jersey Company?

Mr. Welch: Just a moment. That seems to me a legal conclusion: "Has it any responsibility as to the conduct of the affairs of the Jersey Company."

The Member: I don't think you can make those subtle distinctions now with this witness. *A.* Well, as I see it, its only relationship with the New Jersey Company is through any control that it exercises over the Maine Company which in turn, as I said a while ago, has effective working control over the Jersey Company. I should like to have it understood, however, Your Honor, that—

X-Q. 152. (By Mr. Clark). Now, just a moment: I haven't asked you a question.

The Member: He hasn't finished his answer, apparently.

Mr. Clark: I thought he had.

The Member: He said, "However," so I presume that relates back to what he has already said.

A. (Continuing) I should like, Your Honor, to emphasize again that the only thing I know about Frederick H. Prince, Inc., is what I read in the stipulation.

The Member: You don't want me to assume from that, do you, that the testimony that you have given relating to other than Frederick H. Prince & Company, Inc., goes into facts other than those in the stipulation, do you?

The Witness: My testimony was based entirely on the facts in the stipulation, but I did make substantial inquiries from officers of the corporations and I did make visits to these properties and read the minutes of the corporations and so forth to completely familiarize myself with what was back of this thing, but the basis of my testimony on which I expressed my testimony this morning, wherever it was based on factual material, is entirely in the stipulation, but what I wanted to emphasize here was that with regard to Frederick H. Prince, Inc., I made no inquiries because it seemed to me to be entirely outside the scope of my problem.

X-Q. 153. (By Mr. Clark): And why was that so? A. Was because it—as I understood it, the problem that was involved here was whether or not the Maine Company had failed to distribute the—or had retained its earnings and profits beyond the needs of the business and it didn't seem to me that once having gotten to that point where I analyzed the situation of the Maine Company and found out what its needs were and what its earnings were and what its dividends were and what its problems were, that it was of any significance to know where the money went, once it had left the Maine Company.

X Q. 154. Now, let me ask you this and then I will clear up this situation, I think, in a moment:

Is it your opinion that the F. H. Prince & Company, Inc., did any business whatsoever?

Mr. Welch: That is purely a factual matter.

Mr. Clark: I am asking it as a factual matter.

Mr. Welch: This witness didn't run F. H. Prince & Company, Inc. This witness is an expert. You will get very little help from such a question.

Mr. Clark: Please leave that to me.

Mr. Welch: We object to that question.

The Member: The objection is overruled.

A. I don't know. As I stated before, what I know with regard to this company is in the stipulation.

X Q. 155. (By Mr. Clark). And your opinion as to what we call the Jersey Company is that it conducted no business whatsoever? A. That depends on your definition of what business is.

X Q. 156. I am just asking you what your opinion is. A. The New Jersey Company did conduct business.

X Q. 157. And what business? A. The business that it conducted was pretty largely the meeting of the board of directors to carry out the instructions of the Maine Company and the casting of its vote in the stockholders' meetings of the companies in which it owned stock.

X Q. 158. Any other business so far as you know, from your examination? A. So far as I know, I don't remember any other business.

X Q. 159. Didn't you say this morning that the New Jersey Company was nothing but a shell, a conduit, or something to that effect? A. I believe I did.

X Q. 160. Let me ask you, Mr. Blough, if you consider it a sound policy for a company to hold in a bank large cash balances which were earning nominal interest while bonds

were outstanding and preferred stock is outstanding on which interest and dividend rates vary from four to six percent, and that the bonds could be purchased below par; now, if the question isn't clear, the Reporter will read it to you.—A. I think I grasp the question.

The answer to that question cannot be just a bare "yes" or "no."

Things have to be taken into consideration such as the likelihood or the danger of having to have substantial amounts of cash, which a purchase of your bonds would take away from you and not leave you the freedom to meet any emergencies.

Also, the effect of the action of acquiring your securities on the market in those securities and the possible effect on—being specific to this case—the common stock by an action in purchasing bonds, would have to be taken into consideration. That is, if the acquisition of your bonds and going into the market was—as Mr. Prince testified—going to push up the price of the common, and that wouldn't at all be unlikely. That is a perfectly reasonable financial conclusion to arrive at.

Then it is entirely possible that a sound financial practice would say, "Stay away from the bonds."

However, I do think that it would not have been an unreasonable financial policy for this enterprise to have followed to have acquired some of the bonds that they—if they could have picked them up at a reasonable price—that, however, is an alternative possibility that is extremely difficult to determine, just what the balance was in the light of the conditions existing at the time you were faced with the problem.

Q. 161. Let me ask you this, Mr. Blough: Have you made any inquiry as to whether these bonds could be obtained in the market, or not?—A. Yes, I have.

X-Q. 162. And what is the result of your inquiry? A. Well, the answer that I have obtained in talking, not only to representatives of the company but to an investment banker, is that these bonds are held very closely, and that it is not possible to get any substantial number of them and has not been, for years.

X-Q. 163. Do you know anything about how many sales of those bonds were made during the years in question, and prior thereto? A. No, I don't.

X-Q. 164. You haven't inquired from— A. Yes, I have inquired, but I haven't obtained any information.

X-Q. 165. From whom did you inquire? A. I inquired from the representatives of the company.

X-Q. 166. You have never looked at Moody's or Poor's Manual, have you? A. I certainly have, but I don't think I looked—

X-Q. 167. Have you found anything relative thereto? A. I didn't look this particular point up in Poor's or Moody's.

X-Q. 168. Do you know anything about over-the-counter sales? A. Surely. Of these securities?

X-Q. 169. Yes. A. No.

X-Q. 170. Have you made any inquiry relative thereto? A. Not outside of the officers of the company.

X-Q. 171. Do you know the publication known as "National Bond Summary"? A. Yes, sir; I know of it.

X-Q. 172. What is it? A. I don't know that I can give it any technical definition.

X-Q. 173. I would like to know what your own idea is? A. It is a publication which gives information regarding bonds, and, as I remember it, their prices and quotations at various times.

X-Q. 174. Well, on the market? A. No; I think it is a sort of bankers' journal.

X-Q. 175. Well, doesn't it deal with over-the-counter

transactions, as we know them? A. Yes, that is what I meant, sort of a banking journal to give information about these non-listed securities.

X-Q. 176. What is your idea of over-the-counter transactions? A. Any transaction which is carried on by banking houses or investment security dealers, persons of that kind, when the securities are not dealt in on an organized securities exchange, and sometimes there are over-the-counter markets for securities that actually have listing and registration on a national securities exchange or an organized exchange.

X-Q. 177. Did you hear the testimony of Mr. Prince yesterday? A. Yes, sir.

X-Q. 178. Do you recall whether or not he testified that he could have made another lease to another railway company had there been any abrogation of the New York Central lease? A. Yes, sir; I heard him make such a statement.

X-Q. 179. Did you consider that relative to the evidence that you have given today? A. Yes, sir; I did. I understood him to be—

X-Q. 180. And what—pardon me? A. I understood him to be talking about a period of time very shortly after the development of that lease; I mean, the time that lease was signed back in 1922.

X-Q. 181. What effect did you give in your conclusions this morning on direct testimony to what you heard from Mr. Prince, if any? A. I took into consideration Mr. Prince's testimony as indicating that at or shortly after the time this lease was entered into he thought the lease was perfectly sound and that other railroads would have been willing to have bought it from him; that subsequently, he said that all railroads were in danger, in 1930 to '33. In fact, he thought, I believe, that if it hadn't been for the

R.F.C., all of them except the coal roads might have gone into receivershipment, and so I assume what I believed to be a fact aside from Mr. Prince's testimony, that the assurance with regard to the ability to release this road in case the New York Central gave it up did not apply to the periods '30 to '33, but to the period close to the time when the lease was entered into.

X-Q. 182. It is my recollection, and I may be wrong and subject to correction, but let's see if it is your recollection that Mr. Prince testified that he could have obtained more money at any time from another railroad than the $2,000,000 which he was obtaining from the New York Central?

Now, is that your recollection? A. That wasn't my understanding. The record may show that I am wrong, but that was not my understanding.

X-Q. 183. Do you recall—I think you did say this—but do you recall that you said this morning that the trustees under the New Jersey Company's bonds could probably take over the C. M. D. on a foreclosure if it had been affected? A. No, that wasn't quite what I said.

X-Q. 184. Well, now, please restate it. A. I said that the trustees under the New Jersey bonds undoubtedly would foreclose on the collateral and the C. M. D. certificates were not, as I understand it, part of the collateral, but I also said—I went on and said that undoubtedly the certificates in the Central Manufacturing District would be impounded, I believe is the word I used, for the protection of the guaranteed bonds and for any deficiency that there might be in the collateral of the Jersey bonds, and by "impounded" I had in mind that the court would undoubtedly appoint a receiver, and that the receiver would take charge of all those, and that they would be disposed of for the benefit of the creditors; at any rate, that the Maine Company would lose control over them.

X-Q. 185. Do you know whether or not any sale was made of C. M. D.?

Mr. Welch: Do you mean of C. M. D. certificates?

Mr. Clark: No. I beg your pardon. I do mean certificates.

(Pause.)

The Witness: Pardon me, Your Honor. There is something in the record here I want to get.

Yes.

X-Q. 186. (By Mr. Clark). Then will you please tell what that sale was, when and to whom and to what extent? *A.* I am trying to find the answer. I am quite vague on that, Mr. Clark. I am under the impression that there was a time when the Central Manufacturing District Company was organized and that some of the shares of Central Manufacturing District were conveyed to it and subsequently were conveyed back. That is what I was trying to find, and I seem to be at a loss to find it in the record. I know it is in the stipulation somewhere.

X-Q. 187. Take as much time as you want.

The Witness: Your Honor, could Mr. Green, who is more familiar with this stipulation, find this for me?

X-Q. 188. (By Mr. Clark). Perhaps, if you will pardon me, I might direct attention particularly to 1936 and ask if any sale then was made of C. M. D. certificates. *A.* I am sorry, I closed my review of this case with 1933. It seemed to me that if I was going to put myself in the frame of mind of a person in 1933, I ought to stop there.

X-Q. 189. Do you have from your research any opinion as to the possibility of the Maine Company purchasing bonds of the New Jersey Company in the open market during 1930 to 1933 or prior thereto? *A.* Will you read that question?

(Question read.)

A. I have made no researches in the market itself. I have discussed the problem with representatives of the company as to the possibility, and I understand from them that it has already been testified to, that there were some that could have been gotten, that the market was fairly thin and had they gone into the market they could not have gotten very many, and that often these casual sales went through before they even knew they were for sale.

X-Q. 190. Have you formed any opinion as to whether it was possible during these years to purchase bonds of the Elevated Railroad Company in the open market? A. No, I haven't.

X-Q. 191. Do you know what the prices of these bonds I am referring to now to either Elevated, as we call it, or the Maine Company, were in the open market during the years here involved, 1930 to 1933, and for prior years or any years prior thereto? A. The Railway?

X-Q. 192. The Elevated. What we call the Elevated. A. These that are guaranteed by the New Jersey Company?

X-Q. 193. Well, I can't say that. I believe it is the Railroad. A. Yes. No, I don't know what the market was.

X-Q. 194. Now, let me ask you this, Mr. Blough: Wouldn't it in your opinion have been possible to effect a substantial saving by having the Maine Company buy in the bonds of the New Jersey Company and Railroad Company instead of waiting for the maturity of those bonds to pay more? A. Yes, sir; I think it would. I am assuming, of course, that it would have been possible to have gotten a substantial number of them. I think there is danger that that might have been not true, but assuming that it was, I think that your statement is correct.

X-Q. 195. And you haven't advised yourself as to whether that was true? A. Well, only in the way in which I said. I inquired from the officers of the company.

The Member: Let me go back to this last question a minute and ask at what price you were assuming the purchase of the Railway bonds in order to effect this saving?

The Witness: Possibly I did a little loose speaking with regard to the Railroad bonds, because I don't know the prices of those, but we do know that there were some of the other bonds on the market, and I think a sheet was introduced in evidence yesterday indicating something about the prices of the others, and I was more or less going on that rather than on the railroad bonds.

The Member: But as to the bonds other than the railroad you were taking, you were assuming the purchase at the prevailing market prices?

The Witness: At the prevailing market prices. Some of them ran a little below par and some of them a little above par, and that is why I said assuming that you could get any substantial number at those prices. I don't know whether you could have or not. The officers led me to believe that it might not have been possible.

X-Q. 196. (By Mr. Clark). Do you know what was the amount of the assets of the Maine Company which were not invested in the securities of its subsidiaries in the years 1930 to 1933, inclusive? *A.* Yes, sir.

X-Q. 197. And what was that amount? *A.* That is the Maine Company now you are speaking of?

X-Q. 198. Yes.

Mr. Welch: If Your Honor please, could we have a short recess?

The Member: Yes.

Mr. Welch: If not, I shall ask to be excused personally.

The Member: No, no. We will take a few minutes recess.

Mr. Welch: Thank you.

(There was a short recess taken.)

Mr. Clark: I have forgotten, Your Honor, at what point I stopped when we had the recess.

The Witness: I believe I can repeat the question, almost. It related to what—

X-Q. 199. (By Mr. Clark). Did I ask you, Mr. Witness, what the amount of assets of the Maine Company was, not invested in securities of its subsidiaries in 1930 to 1933? A. That is my understanding of what your question was.

X-Q. 200. Have you replied to that? A. I had not.

That information is contained in S-52 of the stipulation and will require a trifle—unless I am to detail the assets—will require a little computation to get the total amount. Which do you prefer?

X-Q. 201. Please state the total amount. A. That is the assets exclusive of the investment in the New Jersey Company; is that it?

X-Q. 202. Yes, that is correct, and Produce Terminal. A. And Central Manufacturing District?

X-Q. 203. Yes. A. How about Western Associates?

X-Q. 204. Well, you can leave that out.

Mr. Welch: If Your Honor please, I believe the witness is figuring on the exhibit, itself, which seems to be undesirable.

The Witness: I am sorry; I was.

Mr. Welch: I think it is an official copy he is using, and, therefore, I think it would be better to figure off of it.

The Member: Yes; I thought it was his own copy so I didn't say anything.

(The witness made calculations.)

A. In the year 1930, at December 31, 1930, the assets of the Maine Company, if I have done my adding and subtracting correctly, exclusive of their own bonds in the treasury, was $14,549,310.39.

That should be amended to reduce it by $800,000 of the

notes of the Central Manufacturing District which I assume, from what you are working at, you want to be deducted, so that instead of the figure I gave, it should be $13,749,310.39.

X-Q. 205. (By Mr. Clark). That is in accordance with your research? A. That is in accordance with the calculations I am making right now. That is the only basis I have. "1932" excluding the notes from these subsidiary companies, and excluding treasury bonds, the amount is $16,140,258.24. But in that amount there is $327,307.55 of the notes that were taken over from the Central Manufacturing District Bank, which the testimony showed had no marketability at that time, and also advances to the Stock Yards National Bank and the Stock Yards Trust & Savings Bank of $3,071,779.19.

In 1933, the amount appears to be $14,273,081.50, including these notes receivable taken over from Central Manufacturing District Bank of $322,801.51, and exclusive of the subordinated deposit in the Live Stock National Bank of a million, eight hundred. That is assuming that my hurried calculations from this Exhibit S-52 are correct.

X-Q. 206. What do you think would be the attitude of a wise sagacious manager of a business who is concerned about the approaching maturities of bonds such as these of the New Jersey Company in 1940, if he were the manager of the Maine Company—would be as to whether he would use a substantial amount of the free assets of the overlying company, the Maine Company, to purchase the bonds of the New Jersey Company? A. Well, I think

X-Q. 207. —prior to maturity, of course. A. Yes. I think I, personally, would favor attempting to get a substantial number of those bonds in. Of course, trying to protect a reasonable amount of cash for emergency, that amount of cash that is necessary for emergency is something that entrepreneurs differ on pretty substantially.

There are some financiers who go very strongly on the importance of having a large amount of cash for bargaining power when they go in to make a deal with the bankers, and I feel if they have got a lot of cash they do better than if they have got a smaller amount of cash even with a smaller amount of bonds.

I am frank to say, personally, and I think that is what you are trying to get from me, and I am trying to meet the spirit of your question, personally, my own personal reaction would have been to try to get up more of these bonds saving the interest on them and holding them against 1940 when they would not then have to be met, but that is, as I say, a question on which many financiers have pretty strong feelings, particularly if you are in a period when it doesn't look as though you might be able to get a very good banking deal.

X Q. 208. Do you know at what prices preferred stock of the New Jersey Company was selling at in 1930 to 1933? Or in any of the prior years? *A.* The record shows, I believe, that the preferred stock sold, for the most part, above par, but that in 1932 and 1933 it fell below par.

However, when I inquired about that I was also given to understand that there was very little preferred stock that was really available.

X Q. 209. Well, did you obtain advice as to what extent it fell below par? *A.* I have no independent research as to the value of it. The value which I am relying on is that value which the officers gave me and which is included in one of the documents that is on file in this case.

X Q. 210. Do you recall what document that is? *A.* I can tell you in a minute.

Mr. Green: S-60. It is attached to the stipulation.

A. I am afraid I will have to correct my statement, that there is a copy of the quotation, I believe, on turning to this

exhibit. What it shows is the number of shares that were acquired by the company and the cost of them, from which a computation reveals that in—for the years that are exhibited here, they were below par during 1931, 1932, and 1933; not greatly below par.

X-Q. 211. (By Mr. Clark). Have you finished in that regard, Mr. Witness? A. Yes, sir.

X-Q. 212. Now I am directing your attention to another line of thought—

(Counsel for the Respondent confer.)

The Member: Now we are getting to the point that I referred to the first day, that if this huddle system keeps on too long, I have got to stop it. Every question is preceded by a conference and we are getting along very slowly, entirely too slowly.

Mr. Clark: Well, Your Honor, if you will pardon me, I don't think we are getting along very slowly and I don't think we are the only parties which might be considered as offending, although I will say that there has been more conversation here than there has been at the other table, but I would like to avoid it if I can, and I will attempt to do so.

X-Q. 213. (By Mr. Clark). Do you remember this morning that you testified relative to a two million dollar rental of the Railway Company from its lease to the New York Central? A. Yes, sir.

X-Q. 214. Did you expect that that rental would be stopped? A. I didn't anticipate that it would be stopped. I didn't mean to indicate that I anticipated it would be stopped, but I did say that I thought the situation in the Railroad field—New York Central stock dropped from something like 260 down to 7 or 8 a share during that time.

The whole railroad field was in turmoil. That, considering the conditions in the railroad field and considering the

fact that the people in this organization had continuously felt the urge to build up traffic so as to make that lease stick, gave evidence of the fact that there was danger that the lease might be given up.

That is all I intended to imply; not that I thought that it would.

X Q. 215. I believe from what you stated this morning that there was nothing to indicate that you were an attorney? A. No, sir.

X Q. 216. Have you ever made any investigation relative to the question of whether or not the New Jersey charter, as a corporation, might be extended as it had been extended? A. Yes, I made inquiry with respect to that, in the particular case.

X Q. 217. And what did you find out? A. I learned that it was the opinion of counsel in this particular case that the New Jersey charter could be extended with a two-thirds vote of both classes of stock.

X Q. 218. When you speak of counsel in this case, do you mean counsel who are present here at this time? A. I mean counsel that are present here and, I believe, this morning it was offered for the attention of the court—

X Q. 219. That is all.

Mr. Clark: I ask the rest be stricken.

X Q. 220. (By Mr. Clark). Now, you spoke of obligations of the New Jersey Compa[illegible] for 18½ million, didn't you? A. That is right.

X Q. 221. Now, do you know what the interest charges on that obligation were? A. The interest on the New Jersey bonds, themselves, 4 percent on $4,000,000; 5 percent on $10,000,000; then, in that 18½ million that I mentioned, there were $2,300,000 odd of the Street Railway Company guaranteed, and those, I think—just a minute and I can tell

you what they are—it was the Railroad Company, it was the Elevated Company, is the one I am talking about—

(The witness referred to documents.)

A. (Continuing) —4 percent bonds on those Chicago Junction Railroad Company bonds; that par 4 percent and then there is 2¼ million dollars that I mentioned in that figure, of Central Manufacturing District bonds, and those are guaranteed by the New Jersey Company, as are also the Railroad bonds and those Central Manufacturing District bonds—

X-Q. 222. Well, no; all I am asking you is what the interest charges were; not whether anything is guaranteed or not. A. I am explaining which bonds I am referring to.

Well, the interest charges for these Central Manufacturing District bonds did not accrue to the New Jersey Company. The only charges they had for interest was 4 percent on the $4,000,000 of their own bonds; 5 percent on the $10,000,000 of their own bonds, and then during a portion of the period, 4 percent on the two hundred and thirty odd thousand that they had to pay for the benefit of the Railroad Company, which was not collecting its rental.

X-Q. 223. Now, then, can you tell me the answer to the question I asked, as to what the interest charges were on this 18½ million; the annual— A. I am sorry, I don't believe I have that information. I could only impute it by computing the interest rate on the face of the bonds. I don't have the details of that figure.

X-Q. 224. Then I take it you have no personal information as to the relationship of the $2,000,000 annual rental from the New York Central to the amount of these interest charges; is that right? A. I can't quite see what bearing they have.

X-Q. 225. No. I ask you to answer the question.

Mr. Clark: Mr. Reporter, will you read it, if the witness doesn't understand it?

(Last question read.)

A. I am afraid I don't.

X-Q. 226. (By Mr. Clark). Did you, in your investigation, discover what year the Indiana Harbor Belt Railway bonds were issued? A. I think I have that information somewhere.

Those were issued in 1907.

X-Q. 227. All of them in that year? A. Wait a minute, I think I got the wrong one. I was thinking of the Railroad bonds of the Lake Shore & Michigan Railroad Company that came over of 2½ million. 1907 is not the year.

March 1, 1905, is the year in which the $2,327,000 of 4 percent first mortgage bonds of the Chicago Junction Railroad Company were issued.

X-Q. 228. That is, the entire issue of those bonds, so far as you know? A. That is right.

X-Q. 229. Do you know what the income from those bonds was? A. Four percent—well, in the first year—there was a sliding scale in the early years. I have forgotten exactly what it was, but the first year or two it was one or two percent and then it jumped a little more until finally after three or four years it got to 4 percent, but that was away back between 1905 and 1910. By 1910 I think it was par 4 percent, and carried that throughout the period under consideration.

X-Q. 230. Have you in your consideration of the inclusions that you have stated considered whether or not this might have been applied to prior funds for the maturity of the Jersey Company bonds? A. These bonds were bonds which were guaranteed by the New Jersey Company and had no value of themselves except the guarantee of the New Jersey Company, and I can't quite imagine that there

would be in any way in which they could be used as collateral or as a basis for paying off the New Jersey Company's own bonds.

X-Q. 231. I am directing your attention to a different line entirely now, Mr. Witness, and I may have some difficulty in reading some of the notes which I have before me, so I will ask His Honor's indulgence, and yours, for a moment.

Referring to the New York Central lease, do you know whether or not the Interstate Commerce Commission has approved or disapproved the rental paid for that lease? *A.* There is in the documents filed in this case an order of the Interstate Commerce Commission approving the $2,000,000 rental but reserving the right to reopen the case on its own motion.

X-Q. 232. Referring to what is known as the Railway Company—I have forgotten whether it is described as that in the vernacular here—am I right in referring— *A.* It is the Steam road?

X-Q. 233. No, it is the Railway. *A.* Railway Company is the steam road.

X-Q. 234. I see.

Do you know of any portion of the Railway operating revenues which are derived from the divisions with trunk line railroads? *A.* It is my understanding that any division of rates with trunk line railroads goes to the New York Central, that all the Railway Company gets out of it is its $2,000,000 rental from the New York Central, and any adjustment with trunk lines for short hauls in there is a matter for the New York Central to determine.

X-Q. 235. Well, aren't there railway revenues from switching and trackage rights? *A.* Undoubtedly the Railway—I mean the lessor; the lessee, that is, the New York Central, of this railroad gets charges for switching and trackage rights, and so forth, and if the Railway Company

had the possession of its property and were operating it, that would be its source of revenue, but—I mean, one of its sources of revenue, but, as I understand it, it gets nothing for that now, that being entirely a matter for the New York Central, which is the lessee of the road.

X-Q. 236. Well, am I right or wrong in thinking that you stated that the Railway Company derived revenues from trunk line railroads for loading and unloading? *A.* You are wrong in that, sir. The Transit Company is the one. That is the one that operates the stock yards, themselves, and, as I understand it, gets the loading and unloading charge from the railroads.

X-Q. 237. So, if I am wrong, you want to correct me in that regard? *A.* Well, that wasn't part of my testimony; that was somebody else's testimony.

X-Q. 238. I see. *A.* That was my understanding of it.

X-Q. 239. I had an idea that you testified to that effect; but I may be wrong, sir. Do you know whether or not the lease to the New York Central was contested by other railroads? *A.* Yes; it is my understanding that there was a suit by one of the other long-line railroads attempting to invalidate that lease.

X-Q. 240. Do you know whether there was more than one railroad involved in that suit in the attempt to invalidate the lease? *A.* Well, I don't really know. It is my impression that there were several, but I don't know for sure.

X-Q. 241. Have you made any investigation in that regard? *A.* Only to learn that there had been such a suit and that it had been settled, I believe.

X-Q. 242. And from whom did you learn that? *A.* Some of the officers of some of the companies. I wouldn't want to say right now where I got the information.

X-Q. 243. Somebody told you? *A.* That is right. I have

no court records that I have inspected giving the information on it.

Mr. Clark: Please pardon me a moment, Your Honor. (Pause.)

X-Q. 244. (By Mr. Clark). Do you have any familiarity with the rate-making policies of the Secretary of Agriculture of the Department of Agriculture as to the stock yards? *A.* Only in general.

X-Q. 245. And from what source do you have that information? *A.* Well, my general reading in economics, and my discussions with a gentleman who happens to be the chief accountant in charge of that work. I have gotten a somewhat general idea as to what the responsibility and authority of the Secretary of Agriculture is over the stock yards. It is my understanding that he is in a position to fix the rates for the care of cattle, the feeding, and handling, and so forth, and that he is required to allow the usual rate of return much as any public utility regulatory body has authority over a public utility.

X-Q. 246. Do you have from your investigation relative to this case, or in any other way, any information as to whether since the passage of the Packers and Stock Yards Act, so-called, through the year 1933, any rate has been cut by the Secretary of Agriculture? *A.* Well, I know there has been a cut in the handling charges of cattle, but when that was, whether it was during this period or before or after, I don't know.

X-Q. 247. How did you get that information? *A.* Well, it is information that I had before I came in contact with this case, and I can't identify my source now.

X-Q. 248. Have you in the course of your preparation for testimony in this case investigated a contract dated October 1, 1914, which is an exhibit here. *A.* Let's see. That

is the one that relates to the by-passing, so to speak, of the dividends passed the New Jersey Company?

X-Q. 249. Yes, that is the one. *A.* Yes, I have read that.

X-Q. 250. Now, in reading that, did you form any conclusion as to whether the Maine Company, so-called, disclaimed all liability for the bond obligations of the New Jersey Company? *A.* I am sorry. I don't remember that feature of it.

X-Q. 251. I believe that you testified, Mr. Blough, that, as you understood it, the preferred stock of the New Jersey Company was closely held; am I correct in that? *A.* No, sir.

X-Q. 252. Have you formed any opinion as to whether or not it was closely held? *A.* I made inquiry as to that, and I understood that it was held by a very large—by a substantial number. It seems to me the figure ran over 2,000 stockholders.

Mr. Clark: I have no further cross.

Mr. Welch: I have nothing in redirect, Mr. Blough. I am very much obliged to you, sir.

The Member: May I ask you just one or two questions?

The Witness: Surely.

The Member: As I understood you on your direct examination, in elucidation of your opinion about the reasonableness of the acquisition of this fund by the Maine Company against the emergencies up to 1940, that was the principal ground upon which you justified the holding of these companies, and I want to know whether in view of the fact that the Maine Corporation shares were all owned by one man, whether it would not in your opinion have been equally efficacious for the purpose of meeting the 1940 de-

mands and the other demands to have the same moneys held in the hands—distributed to and held in the hands of the only shareholder? A. The question there, of course, rests entirely on what the only shareholder would have done with it. As long as it is in the corporate structure itself, it is there available for the corporate officers to act with without any action by the individual shareholder. The shares are there as protection.

The Member: The shares?

The Witness: I mean the moneys are there as protection to persons who are interested in the obligations of the organization. Of course, if there is a sole stockholder—

The Member: There isn't any question about that, is there?

The Witness: No. Oh, no.

The Member: There is a sole stockholder, isn't there?

The Witness: If you have a sole stockholder, and if there is some provision on his part for keeping those funds intact in his own possession, they are probably about as safe there as in the corporate possession as long as he can dictate the corporation policies. That is absolutely true. On the other hand, those funds are not in the corporation for the benefit of the corporation, and the action of other members of the board of directors, and in case anything should by chance happen to him, the creditors of this underlying company, the New Jersey Company, should be protected, and while that might be a very good reason for having left the funds with the New Jersey Company, and that is entirely possible, that the funds might better have been left down there, but, at any rate, while they are in this corporate structure, they appear at least to be more secure for the interests of the enterprise than once when they have been

completely withdrawn and taken out of the corporate structure.

That would be the only reply to that I would have to make to Your Honor.

The Member: Now, as long as they are held by the corporation and the corporation shares are entirely held by one individual a creditor can feel no greater security of the retention of those funds than he could feel than if they were held by the individual, can he?

The Witness: The creditor of the Maine Corporation could but I will agree that the creditor of the Jersey Corporation possibly could not; although I do think there is quite a—at least a psychological difference between having funds devoted to a corporate purpose and having them entirely pulled out of the corporate enterprise and devoted to a personal purpose.

The Member: Is that only because the times are attuned to corporations and that things that are in the hands of a corporation are sort of imponderably believed by some people to be safer than if they were in the hands of an individual? Is that all it amounts to?

The Witness: No, I don't think that that is it.

The Member: What is it? I would like to get something substantial to grasp as to an amount in the millions of dollars that is in the hands of a corporation all owned and controlled by one individual than the same amount in the hands of that one individual. Doesn't it all come down to the integrity or confidence in the indiyidual?

The Witness: Well, I shall have to say that there is a great deal in what you say, Your Honor.

There is the further thing that so long as it is in the corporation it is one more step removed from the point

where the single stockholder can write his check and spend it as he pleases. As long as it is in the corporation it is devoted to the purposes of the business. When it is not he can draw a check and do as he pleases. As long as it is in the corporation it takes a formal legal action to remove it from the business enterprise.

The Member: But that is all it does take, isn't it, merely formal action? I mean, when he is the only interested person there isn't any question about the legal action, is there: all he has to do is to declare a dividend, doesn't he, or require the directors to declare a dividend?

The Witness: Surely. The legal aspect—

The Member: They act entirely at his suggestion in that respect, don't they?

The Witness: That is right.

The Member: They hold their office at his behest, don't they?

The Witness: Undoubtedly if he told them to declare a dividend they would declare it.

The Member: Here there was not any actual chance of demand by others that could impede his action about distributing, was there?

The Witness: The only thing that there was directly were the holders of the Maine Company bonds, themselves; and, of course, I suspect that the holders of the New Jersey common stock who had this guarantee, who had to guarantee his payment up to 9 percent dividends, would have a right against the directors if these funds had been distributed and they had been left without protection for their guarantee because, actually, there were times when they got down into the red, and if the Maine Company had not

protected its funds and been in a position to maintain the guarantee, or if the company had gotten into serious difficulty so that they couldn't have paid the guarantee and they had depleted their assets through large distribution of dividends to the stockholder of the Maine Company, I should think that that might have been something for causing them to pause.

The Member: But if the individual had retained the funds in the same form in which they had been retained by the corporation, there would have been no chance of an action like that by these guaranteed shareholders, would there?

The Witness: Well, assuming he had brought them back in and taken care of the situation.

The Member: He could have seen to it at any moment that the funds with which the guarantee could be assured were kept in a place where they could be used for that purpose, just as the corporation could, couldn't he?

The Witness: That is right. He could. The thing I had in mind was—

The Member: So that it became only a question of integrity.

The Witness: As it turns out, that probably is the primary distinction, but suppose that these dividends had been declared and then suppose there had been losses and Mr. Prince's fortune had disappeared, you would then have had the bondholders of the Maine Company and also these guaranteed stockholders looking to a corporation that had been depleted and the individual had gotten into financial difficulties.

As long as those funds are devoted to the corporate

purpose and taken care of for corporate purposes only, they are not in danger of being frittered away, otherwise.

The Member: One other thing: You spoke throughout your testimony of the New Jersey Company as the holding company, didn't you?

The Witness: I used that term, calling it an intermediate holding company.

The Member: Yes. And is the Maine Company, in that vernacular, any less a holding company?

The Witness: Oh, no, it is a holding company in the vernacular that I was using.

The Member: Yes.

That is all.

Mr. Welch: That is all, Mr. Blough. (Witness excused.)

Mr. Clark: I wonder, Your Honor, if we might suspend now. I understand the Petitioner has one more witness.

Mr. Welch: One or two.

The Member: All right, we will suspend now until 10 o'clock tomorrow morning.

(Whereupon, at 4:20 o'clock p. m., February 2, 1939, the hearing in the above-entitled matter was adjourned.)

[Title omitted.]

FIFTH DAY.

REPORTER'S MINUTES.

[Filed February 4, 1939.]

Hearing at Washington, D. C., on the 3rd day of February, 1939, at 10 o'clock a. m.

The hearing in the above-entitled proceeding was resumed on this the 3rd day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

Mr. Welch: I would like now to offer, if I may, and I understand there is no objection, the original tax returns of the Maine Company, the taxpayer, with the understanding, I think, that photostats will be substituted.

I offer first as Exhibit No. 41, the tax return of the taxpayer for the year 1930.

Mr. Pierson: No objection.

(The tax return for the year 1930, so offered and received in evidence, was marked "Petitioner's Exhibit 41," and made a part of this record.)

Mr. Welch: And as Exhibit 42, the return for 1931.

Mr. Pierson: No objection.

(The tax return for the year 1931, so offered and received in evidence, was marked "Petitioner's Exhibit 42," and made a part of this record.)

Mr. Welch: And as 43, the Petitioner's income tax return for the year 1932.

Mr. Pierson: No objection.

(The tax return for the year 1932, so offered and received in evidence, was marked "Petitioner's Exhibit 43," and made a part of this record.)

Mr. Welch: No. 44, the Petitioner's income tax return for the year 1933.

Mr. Pierson: No objection.

(The tax return for the year 1933, so offered and received in evidence, was marked "Petitioner's Exhibit 44," and made a part of this record.)

Mr. Pierson: If Your Honor please, let the record show that those returns are furnished by the Respondent.

Mr. Welch: Mr. Green, will you take the stand, please? I am about to talk about another chart, and I again have one of reduced size for Your Honor (handing a chart to the member).

MR. LAWRENCE E. GREEN

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Mr. Welch: I would like to say, if Your Honor please, that I had originally intended that Mr. Walker, the next expert, should testify as to the preparation of the chart, but it occurred to me last night that we would go much more swiftly in both direct and cross if Mr. Green testifies to the mechanical preparation of it because he is somewhat more familiar with it.

Direct Examination.

Q. 1. (By Mr. Welch). Your full name, sir? A. Lawrence E. Green.

Q. 2. And you live where, Mr. Green? A. Dedham, Mass.

Q. 3. You were sworn just now? *A.* Yes, sir.

Q. 4. Have you been engaged in the preparation of this case for trial? *A.* I have.

Q. 5. Did you at some time confer with a Mr. Walker in reference to the preparation of a chart for use in this trial? *A.* Yes.

Q. 6. With what Mr. Walker? *A.* Mr. Elisha Walker.

Q. 7. About when did you first confer with him about it? *A.* My best recollection is that it was in the late autumn or the latter part of 1938.

Q. 8. As a consequence of that, did you do some work in preparation of a chart? *A.* I did.

Q. 9. What did you do first, Mr. Green? That is to say, did you produce something other than what is in the court room, first? *A.* I first produced on a somewhat smaller scale but in the same proportions a chart, a copy of which is on that easel. I then showed that chart to Mr. Walker. We checked it and after checking it, I turned the checked chart over to a mechanical draftsman, who could do this thing more artistically than I could, and instructed him to enlarge it, I think, to double its size. He then prepared a plan of the chart, which I checked, and this chart which is on the easel is developed from that plan by some kind of photographic process.

Q. 10. Have you in the courtroom the material from which the chart was prepared? *A.* I have.

Q. 11. What is the basic source of the figures that are represented on the chart? *A.* The exhibits attached to the stipulation, particularly S-4, S-6, S-9, S-13, S-15, S-27, S-35, S-37, S-52, S-59, S-60, S-62, S-64, and Petitioner's Exhibit 38.

Mr. Welch: I would like, now, to offer the chart in evidence so that it will have a number and be referred to properly in the record.

Mr. Clark: Your Honor, I think it should be marked for identification at this time. I am not ready to admit it in evidence without objection.

The Member: Do you make an objection?

Mr. Clark: I make an objection; yes, sir.

The Member: It is offered and if you have any objection, now is the time to make it.

What is your objection?

Mr. Clark: My objection is that while this statement of the basic figures have been made there hasn't been any identification of those figures and there is nothing I can tell with reference to this chart as to what those figures mean which are contained in S-4, S-6, S-9, and so forth.

The Member: I will overrule the objection.

Mr. Clark: And will you note an exception, Your Honor.

The Member: Yes.

What is the number?

The Clerk: No. 45.

(The chart so offered and received in evidence was marked "Petitioner's Exhibit 45," and made a part of this record.)

Q 12. (By Mr. Welch). Mr. Green, directing your attention to Petitioner's Exhibit 45, will you now be good enough to tell us what that chart contains and how it is made up.

A. Perhaps the best way to do that is to take any year. I will take the year 1933, as an example.

The red column on that chart up to the point marked "b" represents the outstanding bonds at par of the Maine Company, the New Jersey Company, the Railroad Company, and the Central Manufacturing District.

Up to, I think, 1930, and while bonds of the Transit Company were outstanding in the sum of $500,000, that column in each of the years up to 1930 includes those bonds.

Also during a short period in the early '20's there were

some bonds of the Railway Company outstanding and during the years that those bonds are outstanding they appear on that chart in that portion of the red column headed "b."

The portion of the red column from the top of "b" from the top of the portion of the column headed "p" represents the preferred stock of the New Jersey Company outstanding in the hands of the public at its par value or the amount necessary to retire that stock at par.

That portion of the red column in the box headed "c" represents the amount of money necessary to purchase all common stock of the New Jersey Company outstanding in the hands of the public at its market value at the end of each year.

The Member: Mr. Welch, are there additional copies of this in your possession now?

Mr. Welch: Yes.

The Member: I notice that there are some people whom I suspect are experts on one side or another. They are going to be required to counteract the force of this and I think it would be useful to everybody if some extra copies could be distributed around instead of craning their necks in order to see what is on the chart.

Mr. Welch: May I say a word off the record?

The Member: Yes; off the record. (There was a discussion off the record.)

Q. 13. (By Mr. Welch). Will you proceed, Mr. Green? A. The blue column, taking the year 1933, for example, includes the resources, certain resources of the Maine Company and the other companies which appear—and all of the other companies which appear on Petitioner's Exhibit 1.

For the Maine Company there is included in the blue column as of December 31, 1933, its cash, accounts receiv-

able, notes receivable, its investment in Central Manufacturing District 5 percent bonds and its other investments which appear on S-52.

For the New Jersey Company there appears its cash—

Q. 14. There appears where, please? *A.* In the blue column—there is included in the blue column its cash and other investments as appears on S-27.

There is also included the Indiana Harbor Belt Railroad Company bonds at a value of $2,500,000.

This item appears on S-27 at a value of $50,000. That was the book value of its bonds on the books of the New Jersey Company.

Q. 15. But it is taken into the blue column at what figure? *A.* It is taken into the blue column at $2,500,000.

For the Transit Company there appears its cash and other investments as taken from S-4.

For the Harness and Saddlery Company there appears its cash as taken from S-6. It had no other investments.

Q. 16. And once again, when you say "it appears"—? *A.* It is included in the blue column.

All of these items I am not giving are in the blue column.

It is included in the blue column for the Railroad Company its cash and investments as appears in S-9.

For the Central Manufacturing District there is included in the blue column its cash and other investments as appears in S-35.

For the produce Terminal Corporation there is included in the blue column its cash and other investments as appear in S-15.

For the Central Storage and Forwarding Corporation, there is included in the blue column its cash as appears in S-37. It had no investment.

For the Pau Corporation, there is included in the blue

column its cash as appears in S-64. It had no other investments—it had no investments.

The total of all of those items which I have described composes that blue column for 1933, and I have gone through a similar process in each of the years, both as to the red column and the blue column.

Mr. Welch: You may inquire, Mr. Clark.

Cross-Examination.

X-Q. 17. (By Mr. Clark). Mr. Green, I am sure you are quite aware that I have never seen this chart before. *A.* I think that is correct.

X-Q. 18. And have never even heard anything about it. *A.* So far as I know, you haven't.

X-Q. 19. Consequently I have to ask you quite a few questions because I am not at all clear about this. Do I understand that this chart—

Mr. Clark: And Your Honor has before you a copy of it?

The Member: Yes.

X-Q. 20. (By Mr. Clark). I understand this chart was prepared by you? *A.* Yes, sir; that is, not the final, artistic copy.

X-Q. 21. No. *A.* But the chart—all the real work and preparation was done by me.

X-Q. 22. Now, let me see: There is a red column here which you say shows "Requirement for Money to Discharge Fund Debt Represented by Bonds and to Liquidate the New Jersey Company." Does that start with the year 1911? *A.* It starts with December 31, 1911; that is the first column.

X-Q. 23. Well, now, please tell me what you mean by that. *A.* I mean the amount of money required to pay off the outstanding bonds of the Maine Company held by the public at par, the outstanding bonds of the New Jersey Company at par; the outstanding bonds of the Railroad

Company at par; the outstanding bonds of Central Manufacturing District at par; the amount of money required to pay off the New Jersey Company preferred stock outstanding in the public at par, and the amount of money required to purchase the New Jersey common stock outstanding at the end of the year at its then market value.

X-Q. 24. And that is all combined in this red column? A. That is correct.

X-Q. 25. Now, what basic sources did you use in arriving at this determination of the amount required? A. I think I have just stated.

X-Q. 26. Well, I am not clear about it. A. I used the par value of the Maine bonds, the Maine Company bonds, which were outstanding in the hands of the public, the par value of the New Jersey Company bonds, the par value of the Railroad Company bonds, the par value of the Central Manufacturing District Company bonds, the par value of the New Jersey preferred stock, which is outstanding in the hands of the public at the end of each year as shown by S-60, and the market value as shown by Petitioner's Exhibit 38 of the common stock of the New Jersey Company, which is outstanding in the hands of the public at the end of each year as shown by S-59.

X-Q. 27. Well, that is, you took the par value of these bonds in this preferred stock in this year without any equation for discount, or anything of that sort? A. Yes, sir.

X-Q. 28. Do you think that is a correct method? A. I think so.

X-Q. 29. Are you an accountant? A. Sort of by hand; I am not one by training.

X-Q. 30. Did you have any advice from an accountant in arriving at that determination? A. No, sir.

X-Q. 31. Now, is that same situation true as to each of these red lines? A. You mean the red columns?

X-Q. 32. Yes. *A.* It is. The same situation is true for each year except that, as I have stated, in some of the years there were bonds of the Transit Company and the Railway Company outstanding, and I put them in—put the outstanding bonds in at their par value.

X-Q. 33. Now, I hadn't examined with reference to your testimony these exhibits to which you have referred, but it is my understanding, and I have no particular desire to question you relative thereto, that all of this information which you used in your own particular manner came from these exhibits? *A.* That is correct, except that I should have added, Mr. Clark, that the story about the Indiana Harbor Belt Railroad Company bonds is not contained in the exhibits but in the stipulation itself. That was my basis for using a value—an amount—a value of $250,000 for these bonds and including it in the blue column instead of using the book value of these bonds on the book of the New Jersey Company, which was much less, only $50,000.

Mr. Welch: May we have the last answer read?

Mr. Green, I think you have got a mistake in amounts, which is unlike you. (Answer read.)

The Witness: If you will strike out the figure "$250,000" in that answer, and include "$2,500,000," for the value of the Indiana Harbor Belt Railway Company bonds, it will be correct. I am sorry. That was an inadvertent mistake.

X-Q. 54. (By Mr. Clark). I am directing attention now to these blue columns, Mr. Green. Will you please tell me if they reflect the changes which were made in the stipulation prior to its ultimate signature? *A.* I cannot answer that question "yes" or "no," Mr. Clark.

X-Q. 35. Well— *A.* I can explain to you how they affected it, if you want, how they did or did not affect it.

X-Q. 36. Well, now, answer me this: When was this made up by you? *A.* It was finally made up within and sent to

the draftsman and finally checked, I should say, within the last two weeks.

X-Q. 37. When you say you finally made it up, do you mean finally made up by you? *A.* Correct.

X-Q. 38. Not the mechanical work? *A.* That is correct. I mean to say—go ahead.

X-Q. 39. That was prior to the signature of the stipulation ultimately filed here, wasn't it? *A.* I do not know. It was after we signed the stipulation. Whether it was after you signed it, I don't know.

X-Q. 40. Well, was it prior to or subsequent to the last changes made in the stipulation? *A.* It was prior to changes made in the stipulation which did not affect any of the items which went into this chart.

X-Q. 41. I know that you are thoroughly familiar with the stipulation, and if you say that is so— *A.* It is so, Mr. Clark.

X-Q. 42. —I will take no exception thereto. Do you know what percentage of the New Jersey Company stock was owned by the Maine Company in each of the years that are covered by the chart? *A.* I could give you the exact number of shares. I would have to compute the percentage.

X-Q. 43. Well, please give me the exact number of shares. *A.* You want me to take it year by year?

X-Q. 44. Yes, if you will, please.

Mr. Welch: Beginning in 1911?

Mr. Clark: Yes.

A. In 1911—you mean the amount that was outstanding or owned by the Maine Company?

X-Q. 45. (By Mr. Clark). Owned by the Maine Company. You might also give the total of outstanding shares as compared with the Maine Company's ownership. *A.* At the end of the year 1911, the Maine Company owned 18,705 shares of New Jersey common stock as appears from S-59.

At that time, accordingly, 46,295 shares were held by the public,—

The Member: Let me get this clear because this word "public"—

The Witness: By others than the Maine Company.

The Member: —is a fleeting word. That is all that is meant, isn't it? You are talking about the Maine Company on the one hand and everybody else on the other?

The Witness: I will use "others than the Maine Company" in each case.

(Continuing) 1912: Maine Company, 30,871; others, 34,129.

1913: Maine Company, 31,070; others, 33,930.
1914: Maine Company, 31,175; others, 33,825.
1915: Maine Company, 31,175; others, 33,825.
1916: Maine Company, 31,200; others, 33,800.
1917: Maine Company, 31,200; others, 33,800.
1918: Maine Company, 49,129; others, 15,871.
1919: Maine Company, 49,267; others, 15,733.
1920: Maine Company, 50,723; others, 14,277.
1921: 50,953; others, 14,047.
1922: Maine Company, 55,889; others, 9,111.
1923: Maine Company, 56,107; others, 8,893.
1924: Maine Company, 56,174; others, 8,826.
1925: Maine Company, 57,058; others, 7,942.
1926: Maine Company, 57,326; others, 7,674.
1927: Maine Company, 57,897; others, 7,103.
1928: Maine Company, 58,505; others, 6,495.
1929: Maine Company, 58,742; others, 6,258.
1930: Maine Company, 58,995; others, 6,005.
1931: Maine Company, 59,599; others, 5,401.
1932: Maine Company, 59,979; others, 5,021.
1933: Maine Company, 60,336; others, 4,664.

The Member: It is correct, isn't it, that this chart re-

flects the increasing amount year after year of the New Jersey common which the Maine Company acquired by showing the correlatively reducing expanse of the red column part which is marked "c"?

The Witness: Yes, sir.

The Member: Is that right?

The Witness: Yes, sir.

The Member: So that the upper part of that column between the letters "c" and "p" which is comparatively large in the year 1911, comes down to a comparatively small part in the year 1933.

The Witness: That is correct.

Mr. Clark: Please pardon me a moment, Your Honor. (Counsel for Respondent confer.)

X-Q. 46. (By Mr. Clark). What you were testifying to just now, Mr. Green, was the common stock of New Jersey, wasn't it? *A.* Yes, sir.

X-Q. 47. Now, will you please give me the same figure for the preferred stock for the same year; I mean the figure for the same year, not the same figures. *A.* Well, for each of the years from December 31, 1911, to December 31, 1928, inclusive, the Maine Company owned no New Jersey preferred stock; all of it was owned by others.

On December 31, 1929, the Maine Company owned 457 shares of New Jersey preferred stock and 64,543 were owned by others.

For 1930, the figures are: Maine Company, 647; others, 64,353.

For 1931: Maine Company, 1,263; others, 63,737.

For 1932, the figures are: Maine, 1,565; others, 63,435.

For 1933, the figures are: Maine Company, 2,362; others, 62,638.

X-Q. 48. I am sure you know, Mr. Green, and please tell the Board what the maturity date of each of the issues of

securities which is shown in the red columns. A. The maturity date of the New Jersey bond issue of $14,000,000, consisting of 10,000,000 5 percent and 4,000,000 4 percent, is April 1, 1940.

The maturity of the bonds of the Railroad Company which are guaranteed by the New Jersey Company is 1945. I don't remember the exact date.

The maturity date of the bonds of the Central Manufacturing District varies. They are serial bonds.

The date at which the last ones come due is, according to my recollection, 1941.

The bonds of the Maine Company have a maturity date of 1965, but there is a covenant in the mortgage securing these bonds that the Maine Company will keep the New Jersey Company alive, and there is further the circumstances that these bonds are secured solely by common stock of the New Jersey Company. Those are all the bond issues that are in the picture.

Mr. Welch: Mr. Green, in stating the—

The Witness: I beg your pardon, sir; and there is one other bond issue in the picture, and that is the Indiana Harbor Belt Railroad, which is included in the asset or blue column.

The maturity date of those bonds is 1957.

Mr. Welch: Mr. Green, you gave the maturity date of the Maine bonds as 1965, and you are possibly in error. Will you check it from the original.

The Witness: 1961, I think, is the correct date.

Mr. Clark: Just a moment, Your Honor.

(Counsel for the Respondent confer.)

X-Q. 49. (By Mr. Clark). You made a statement, Mr. Green, about a covenant of the Maine Company to keep the New Jersey Company alive. A. Yes, Mr. Clark.

X-Q. 50. What is that? I don't understand that and never heard of that. A. I am now reading from S-42, page 8—

X-Q. 51. Now just a moment— A. Covenant No. 12, which says: "The company shall do whatever may be necessary for the purpose of maintaining or preserving the corporate existence of Chicago Junction Railway and Union Stock Yards Company."

X-Q. 52. Now, please, just a moment, Mr. Green, because I am not entirely familiar with this. A. I will wait for you, Mr. Clark. (Counsel for the Respondent confer.)

A. Off the record, that is S-42, on page 8.

X-Q. 53. I see. Well, that was a paragraph with which I was unfamiliar. A. There is more to the paragraph but I think that is the material part.

The Member: What is the nature of that exhibit? I haven't it before me.

The Witness: That is the trust mortgage given by the Maine Company to the old Colony Trust Company as trustee to secure the issue of the Maine Company bonds.

X-Q. 54. (By Mr. Clark). I am not quite clear about this, Mr. Green.

In this chart, are the amounts of securities which mature many years later than some figures which represent stock without maturity being compared with current assets? A. I am afraid I don't quite understand that question.

Mr. Clark: Please re-read the question, Mr. Reporter. (Question read.)

A. I can't answer that, Mr. Clark, because I still don't understand it.

The Member: I don't, either. How can you have bonds maturing many years after stock which has no maturity.

Mr. Clark: Well, Your Honor, if you will permit me a moment, perhaps I can clear this up. It is not entirely

clear in my own mind. (Counsel for the Respondent confer.)

X-Q. 55. (By Mr. Clark), Are there co-mingled in the red columns bonds that have various maturity dates with preferred stock? *A.* Common stock, yes.

X-Q. 56. Yes. Now, do you think that is a correct method of procedure? *A.* I certainly do.

X-Q. 57. And why? *A.* The Maine Company in order to preserve its investment in the New Jersey Company has to discharge certain liens and other items which are ahead of its investment.

Now every one of those items must be, in effect, discharged by 1940.

X-Q. 58. Now, when you—excuse me. *A.* I haven't finished my answer.

X-Q. 59. I know you haven't.

Mr. Welch: Then let him finish, will you, Mr. Clark?

Mr. Clark: Yes, indeed.

A. (Continuing) The New Jersey bonds, consisting of $14,000,000, mature by their terms in 1940.

It has been testified here that the New Jersey Company will come to an end in 1940 by the terms of its charter.

That the charter can be continued by the affirmative votes of two-thirds of each class of stock and even though you suppose that the affirmative votes of two-thirds of each class of stock can be secured; it is not economically sound or wise to continue the existence of the New Jersey Company but is economically sound and wise to liquidate it.

I believe that, myself.

Now, if you liquidate the New Jersey Company you have to make some provision to replace the guarantee which the New Jersey Company has given for payment of bonds of the Railroad Company which mature in 1945.

Similarly, by 1940 the bonds of the Central Manufacturing

District which the New Jersey Company guaranteed will either have to be paid by their terms, because they have serial maturities, and such as don't mature until 1941 the New Jersey Company will have to put up something to replace the guarantee.

Now as to the Maine Company bonds: Although they don't mature by their terms until 1961, the only security for those bonds, they being collateral trust bonds, is common stock of the New Jersey Company. The minute the New Jersey Company disappears, the security disappears.

Furthermore, there is a covenant in those bonds that the Maine Company will keep the New Jersey Company alive. If the Maine Company liquidates the New Jersey Company it is a breach of that covenant and the bonds will immediately become due.

I have included the preferred stock at par because that is what must happen to the preferred stock by its terms in 1940 if the New Jersey Company is liquidated.

I have included the common stock at its market value, which I think was somewhat low, at the end of each year for the simple reason that in order to liquidate the New Jersey Company the Maine Company must, as a sound economic matter, get its hands on every share of the New Jersey stock which it is possible to acquire. Otherwise you have a distribution in kind of the assets of the New Jersey Company, or some kind of an appraisal. Either procedure is to be avoided, as I think we all know, if it is possible in any way to get in every share of New Jersey common.

Perhaps that is an impossibility but it ought to be done and certainly as the shares outstanding get fewer in number, the price goes up.

Those are substantially the reasons why I have included all those assets.

There is further this to be said: The Maine Company,

ever since at least October 1, 1914, has deliberately withdrawn not only from the New Jersey Company but from all of its subsidiaries and also from the Maine Company's own subsidiaries practically everything they have ever earned.

The New Jersey Company has at no time in its existence been able to discharge any of its obligations without disposing of all of its investments in the Transit Company and the Railway Company and without destroying the purpose for which both the New Jersey Company and the Maine Company were formed.

Accordingly, I have felt that the resources of the Maine Company should be available, and, indeed, I think legally they must be held available to meet not only the obligations of the Maine Company but the obligations of the New Jersey Company. That is the reason I included all those items in the red column.

X-Q. 60. Do you have a compilation of all the figures that have been used in the totals in this chart? A. I have a compilation of each item in detail and the totals that have been used in that chart which you are welcome to have.

The Witness: Mr. Welch, there is a copy on the desk.

(Mr. Welch hands documents to the witness who examines them after which they are handed to Mr. Clark.)

Mr. Clark: That is all.

Mr. Welch: That is all.

The Member: Just let me ask you one question in order to be certain that there is no outstanding doubt.

In preparing the red columns, am I to be assured now that there is nothing even verging upon an inter-company obligation in those red columns?

The Witness: There is no inter-company obligation in those red columns except one, and that is an item of Cen-

tral Manufacturing District Company bonds held by the Maine Company.

For convenience I have included both; the obligation in the red column, but I have included the amount of Central Manufacturing District bonds owned by the Maine Company as an asset in the blue column, so it washes right out.

The Member: What are those respective figures in the red column and in the blue column?

The Witness: In the year 1933, for example, in the blue column there was $30,747. Of that kind, in the red column, there is $31,000.

The Member. That is as to 1933. When does that reciprocal duplication begin?

The Witness: In 1922, in the red column, there is $27,000 of Central Manufacturing District bonds.

In 1923 there is the same amount.

In 1924 there is the same amount.

There is also one other duplicating inter-company item in 1924, which is included both in the blue column and the red column. That is an amount of Transit Company notes which is included in the blue column at $15,022.50, and in the red column at their par value, or $15,000.

1925 is exactly the same as in 1924, as is 1926.

1927 has the same inter-company reciprocal items and also has another item of Central Manufacturing District 5's included in the blue column at $40,672, and in the red column at $41,000.

The Member: Those in each instance represent Maine Corporation—

The Witness: Holdings in those bonds.

The Member: Yes. That is to say, from what you have said so far, the only inter-company item is the Maine Corporation always on the one side and one of the other corpo-

rations on the other such as the Transit Company and the Central Manufacturing District: is that right?

The Witness: That is correct. The Maine Company is always in the blue column and the other companies always in the red column.

The Member: And so far, at least, so far as you have been able to do so, I understand you have not included any inter-company transactions or reflected any inter-company transactions among the other corporations besides the Maine Company?

The Witness: That is correct; no inter-company transactions shown such as included at all, I am confident, there are none except these I mentioned.

The Member: Now, you stopped at 1922, didn't you?

The Witness: '27, I thought.

Now, 1928, there is included in the blue column, Central Manufacturing District 6's there carried by the Maine Company at $27,000, Central Manufacturing District 5's held by the Maine Company at $57,717, and Transit Company 5½'s at $15,022.50. There is included in the red column corresponding to these items I have just mentioned in the blue column C. M. D. 6's, $27,000, C. M. D. 5's, $58,000, and Transit Company 5½'s, $15,000.

The situation in 1929 is exactly the same as it was in 1928 except that there is included in the blue column C. M. D. 5's, $55,733, and in the red column, $56,000.

In 1930, the only item in the blue column is the Maine Company's investment in C. M. D. 5's, $48,703, and in the red column, $49,000.

By that time the Transit Company 5½'s had been paid off and also the Central Manufacturing District 6's.

In 1931, there is included in the blue column, Central Manufacturing District 5's owned by the Maine Company

at $46,693, and the corresponding figure for those bonds in the red column, included in the red column, is $47,000.

In 1932, there is included in the blue column as Central Manufacturing District bonds owned by the Maine Company, $40,667, and the corresponding amount in the red column is $41,000.

And in 1933, I think I have stated, that there is included in the blue column, Central Manufacturing District 5's owned by the Maine Company in the amount of $30,747, and the corresponding amount in the red column is $31,000.

The Member: Now, in the preparation of this chart you have undertaken consciously, have you, to eliminate all inter-company factors?

The Witness: That is correct.

The Member: One other thing: Does the blue column represent an exact and complete total of assets without regard and upon the assumption that all of the assets are to be used for the purposes of the red column?

The Witness: It does with some exceptions which I should tell Your Honor. In the case of operating companies, the accounts receivable have not been taken, and such items from the operating companies, the full amount of the cash and the full amount of their investment has been taken but not such items as accounts and notes receivable or inventories.

The Member: Now, that means, then, that to the extent that there is a divergence from fact in this chart, that divergence is to the effect that the blue column is not as high as it might be; is that correct?

The Witness: If you included the accounts and notes receivable of the operating companies and inventories, and also included their accounts and notes and ordinary items payable, there would be very little difference, both the accounts and the notes and inventories, the accounts and

notes receivable and inventories on the asset side, and the accounts and notes payable on the liability side have been left out on the theory that those are used in their ordinary business affairs.

The Member: Now, am I to take from that, and I am asking you only generally without any attempt to have you be entirely accurate about it—am I to take from that, that the inclusion in both of these columns, the red and the blue, in any one year of factors of receivables and inventories would not affect the correlative position of the two columns?

The Witness: Almost negligibly. I think I should state one further thing to Your Honor. I think it probably is covered by the fact that all inter-company items are eliminated. There is not included in the assets any shares of any of these constituent companies in the enterprise. That I considered an inter-company item. There has also been omitted from the assets such things as are subordinated such as the deposits in the Live Stock National Bank, and other items which it wasn't possible and which the testimony indicates it was not possible for the company to do anything with or to use.

The Member: Anything more from this witness?

You may stand aside. (Witness excused.)

Mr. Welch: Mr. Walker.

MR. ELISHA WALKER.

called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Welch). Your full name, sir? *A.* Elisha Walker.

Q. 2. And where do you live, Mr. Walker? *A.* New York City.

Q. 3. Were you sworn just now? *A.* I was.

Q. 4. What do you do, Mr. Walker? *A.* I am an investment banker.

Q. 5. With what firm and holding what position with what firm? *A.* Partner in Kuhn, Loeb Company.

Q. 6. With offices where? *A.* 52 Williams Street, New York.

Q. 7. Now, Mr. Walker, will you be good enough to give us at least a thumbnail sketch of your life with particular emphasis on your experience in the financial and corporate world. *A.* I graduated from Yale University in 1900 with an A.B. degree. I then went to Massachusetts Institute of Technology, and studied mechanical engineering and naval architecture, and graduated in 1902 with a degree of B. S.

I then entered the employ of the firm of Fisk & Robinson, who were investment bankers, first being given a general course through the office, and then entering the department of what was known as "Examination and Reports." I was set to work quite promptly studying corporations, and at that time I remember making reports on the U. S. Shipbuilding Company, on the Buffalo & Susquehanna Iron Company, in Buffalo, and a couple of railroads, Gulf & Ship Island Railway, and the Louisiana & Arkansas Railroad.

In 1904 I entered the employ of William Solomon & Company, in their statistical department. In 1909 I became a partner in William Solomon & Company, which was also, I might say, in investment banking, an investment banking firm.

In the fall of 1919, I arranged for the combination of the firm of William Solomon & Company and Blair & Company, and I became president of the combined concern called Blair & Company, Inc. I remained as president of that concern until 1929, when I, well, worked out a consolida-

tion with the Bank of America in New York and the Bank of America then changed the name of their affiliate to Bancamerica Blair Corporation. I then became president of the Bancamerica Blair Corporation and chairman of the executive committee of the Bank of America itself.

Then in 1930, on February 15—well, I might insert there, first, that during the summer of 1929, after I had consolidated Blair with the Bancamerica, the Transamerican Corporation secured control of the Bank of America, and, consequently, of its affiliate, the Bancamerica Blair. So late that fall the question came up whether or not I should become chairman of Transamerican Corporation, which I finally undertook because I frankly did not like the idea of being head of a subsidiary controlled by another corporation.

Then I continued in that position for two years as chairman of the board, and the chief executive officer of Transamerican Corporation and consequently responsible for various affiliates, which included the Bank of America on the Coast which had deposits of over a billion dollars.

Q. 8. I didn't get that. *A.* Deposits of over a billion dollars.

Q. 9. When you said "Coast," which Coast? *A.* Pacific Coast, and also of the Bank of America in New York. And various other enterprises, including insurance companies, land companies, and a great mixture of assets.

During that period I had the unpleasant experience of having to write off a great amount of good will or whatever one might call it, to the extent of close to a billion dollars to reduce the assets to normalcy. The result was that in February 15, 1932, I withdrew from the corporation.

Subsequent to that, shortly after that, the partners of Kuhn, Loeb & Company asked me to join their firm as one of the senior partners, which I was happy to do, and from

that day—from the date of my joining, which was the first of January, 1933, until now I have been a partner of that firm.

I think that is briefly my history.

Q. 10. Just a word about what, if anything, you had to do with financing, studying reports, reorganizations, and anything of that sort during that period. *A.* Well, naturally, that has been my job really from the time I went into Wall Street, because I have been director of a great many corporations of both banks and industrial and also in the course of our regular business of financing, it has been necessary to study and work out plans of reorganization, and one thing or another.

Q. 11. Would you be good enough to tell us a few of the companies in which you have held directorships, some that we would be more apt to recognize than others, if you will. *A.* Well, in my bank directorship career, I started as director of the Columbia Trust Company, then the Irving Trust Company, the United States Mortgage & Trust Company, the Chase National Bank, and, of course, in addition, the Bank of America in New York and the Bank of America of California. Amongst industrial corporations, I might mention several oil companies, including the Pan-American Petroleum & Transport Company, Consolidated Oil, Tide-Water Associated Oil. Other industrials, I might mention concerns like Wilson & Company, the packers in Chicago, Armour & Company, also in the same business. I have been a director of the Brooklyn, Manhattan Transit Company.

I don't know whether you want any more. There are lots of smaller ones and maybe some others that I have omitted.

Q. 12. I think that is a nice list, sir.

In the course of your career had you any occasion to

examine into the requirements of companies for money for use in their business? A. Naturally.

Q. 13. Have you had occasion to examine dividend policies of various companies and pass on their soundness? A. Yes, both as director and in connection with financing of companies.

Q. 14. Have you at my request, Mr. Walker, examined the stipulation in the case which has been introduced here? A. Yes, I have.

Q. 15. Are you familiar with the chart, Exhibit 40, which I now show you, and which I will endeavor to put up in the form where it can be seen without putting it on the easel? A. Yes, I have been familiar with that chart in general.

Q. 16. Have you also examined and been instrumental in part in the preparation of the chart which I now point to, which is Petitioner's Exhibit 45? A. Yes, I have.

Q. 17. Have you examined the tax returns of the Petitioner in this case? A. I have.

Q. 18. Which are Exhibits 41 to 44, inclusive? A. I have looked them over.

Q. 19. Have you also read Mr. Reimers' testimony, who testified in this case? A. I have.

Mr. Welch: I offer the witness as an expert who will testify on the point as to whether or not the gains and profits of the Petitioner have been allowed to accumulate beyond the reasonable needs of its business, and I think I should add that in addition to opinion evidence, he will testify on one or two factual matters.

Mr. Clark: I have no objection as to the qualifications of this witness, Your Honor.

Mr. Welch: I don't at all wish it, but I wonder if before he starts his opinion Your Honor would like a recess or wait until we finish?

The Member: I don't care. Normally, I would recess somewhere around 25 minutes or 30 minutes after eleven.

Mr. Clark: I wonder—

The Member: Is this more convenient?

Mr. Clark: I wonder if we might recess now?

Mr. Welch: It might be somewhat more convenient.

The Member: All right. (There was a short recess taken.)

Q. 20. (By Mr. Welch). Mr. Walker, as a result of your examination and your study, have you an opinion as to whether or not the gains or profits of the Maine Company, this taxpayer, were, in the year 1930, permitted to accumulate beyond the reasonable needs of the business? *A.* I have an opinion.

Q. 21. What is your opinion, sir? *A.* That there was not an unreasonable accumulation of surplus or profit.

Q. 22. Have you similarly formed an opinion as to whether or not the gains or profits of this taxpayer were in the year 1932 permitted to accumulate beyond the reasonable needs of the business? *A.* I have; the same opinion.

Q. 23. And as to the year 1933? *A.* The same opinion.

Q. 24. Now, will you in your own way, Mr. Walker, tell us the basis for your opinion and the results that lead you to it. *A.* I naturally look at this problem from my own experience; that is, as a director and as an investment banker.

I look back and I see this company formed in 1911 with a million dollars capital and this contract with the Jersey Corporation.

Now there were two choices for the owner of the Maine Company to take: He could either cash in, take such dividends as he could draw out, and, possibly, leave a shell at the termination of the Jersey Company, which it has been testified as being 1940, or he could endeavor to build that

enterprise and at the end of 1940 have it in a position where it was soundly financed and in proper shape.

There is no question that the latter course was chosen because right in 1911 the Maine Company did offer bonds in exchange for the guaranteed New Jersey stock, so I think that was self-evident as to the policy.

Now by the end of 1911, as you can see from the chart and as I have worked out figures here—

Q. 25. May I interrupt? By the "chart" you mean this Exhibit 45? *A.* Yes, Exhibit 45.

—there was a difference of, roughly, $29,000,000 between the amount of what we might call the quick assets and the fixed liabilities. In other words, between the blue and the red lines.

In other words, it would have required the set-up, roughly —to keep, roughly, a million dollars a year because the Jersey Company had 29 years of life, so that looking at it from that viewpoint they had to save money.

By 1930 that difference has dropped down between the red and blue lines to about $12,000,000.

When I say "1930" I mean the beginning of 1930, because we are considering the four years 1933, inclusive, I take it.

Now that meant that they hadn't kept up to putting aside a million dollars a year and that by that time in order to accomplish the desired result they would have to increase that amortization, as you might call it, in order to take care of the fixed obligations of one kind or another, to, roughly, a million two hundred thousand dollars a year provided, of course, that earnings were to continue normally and nothing unforeseen was to happen.

On the other hand, we all know that unfortunately since 1929 things haven't been quite so rosy and we have had some very difficult times.

Then the question one might probably raise would be cash

versus securities; whether or not it was wise to accumulate as much cash as this corporation has accumulated, or whether they should have bought securities.

I think there could very well be a good difference of opinion on that line but from the object that was to be obtained here it really didn't make any material difference whether that money was invested in securities or cash.

Q. 26. Could I interrupt? By "securities" I take it you mean the securities of the Jersey Company rather than general securities. A. I mean the securities of the Jersey Company and its subsidiaries. Now, there was a certain amount of investment, which, all told, ran into a fair figure, first in the common stock of the Jersey Company; to a lesser extent in the preferred stock, and of course in the bonds of the Maine Company; quite some purchasing; but when we look at 1930 I think almost any one would have said, "Let us keep our cash," and the same in 1932 and 1933. I know, well, those were very trying years. I know the position I happened to have been in in 1930, there, in charge of two very important banks, and I can assure you it was a very trying time; deposits fading away and people very much worried, so I think perhaps the management can be congratulated rather than otherwise for having had the judgment to hold cash during those particular years. Maybe I wouldn't have been quite as wise, in other years. I might have invested a little more money in securities, but when I think of the particular years in question I think probably it was the wisest policy to retain as much cash as possible.

I might also raise the question, "Why hold on to so much cash as against trusting to refinancing, in 1940?"

Well, I have given a good deal of thought to that question, and, frankly, not alone in 1930 to 1933, but even to this very day I think the problem of refinancing this proposition in 1940 would be a very serious one.

What have you got to finance on? If the Jersey Company were kept alive you have got a holding company on top of a holding company which is very unpopular and against the trend of the times, even if you could eliminate one of the holding companies and having a holding company just owning the stock of these subsidiaries, the Transit Company and Railway Company and Central Manufacturing District and Produce Terminal; you have still got nothing but a common collateral trust.

You can't finance on the underlying company; the Transit Company is under I. C. C. They certainly are not going to allow you to put a big bond issue or other security issue on the Transit Company and then have an upstream loan. Upstream loans in some States are illegal. Any way, they are considered, generally, improper.

The same thing applies to the Railway Company and the Produce Terminal Company, while that is not under I. C. C., is under the Illinois Public Service Commission, and that company would find itself up against the same situation of an upstream loan which I feel very confident the Commission would not permit, so the only other one you have got that doesn't come under commissions is the Central Manufacturing District, and I don't think it takes a great deal of argument to see that that company couldn't do an awful lot of financing; a real estate corporation. It has got enough bonds on it right now, so that you get back "What have you got to finance?" and, honestly, in my opinion it is a very serious question for anything but some maybe very minor amount and you might raise enough money for a working capital, or something like that, but it would be a minor amount.

I have explained, in general, my views on the situation.

The Member: May I ask you whether it is true or not that in the financial world with which you are familiar that

in 1930 and thereafter there was a greater regard for the holding of cash for financing than there had been in years prior to that; is that true or isn't it?

The Witness: That is true.

I mean—

The Member: Is it true or is it not true that that regard for cash became increasingly greater after 1929, let us say, so that there was a greater and greater feeling of the desirability of having cash? Is that true?

The Witness: That is true.

The Member: So that in 1933 it was thought more desirable to have cash than it had been in 1930?

The Witness: People were so—

The Member: And that has been progressively so, even to today; is that a fact?

The Witness: I wouldn't say progressively so even to today because I think we went through a period there at the time of the closing of the banks and the devaluation of the dollar, and so forth, where everybody was holding on to their cash in real fear, you might say. I think that, to quite an extent, has passed. I think that people still think awfully well of cash and like to hold onto it but not to quite the extremes of the years, particularly 1932 and 1933.

The Member: Is it, today, more respectable to have cash than it was prior to 1929?

The Witness: I don't know as I quite understand the "respectable" part.

The Member: I am talking about respect for the judgment; that is what I mean. I am not speaking, morally, respectability, but I mean to say is it today regarded, more favorably regarded as good financing to have cash than it was prior to 1929? Does cash hold a better position, that is what I mean?

The Witness: Yes; somewhat more so.

The whole mental attitude prior to 1929 was that things were on the upgrade and the famous new era was talked of and people invested much more freely than they invest today. There is no question about that, but, on the other hand, I think that there is more investment today and a little less holding of cash than there was in a period from the break of 1929 until after the banks had reopened and gradually started to build back, in 1933, 1934, and 1935. In there there was a certain regaining of confidence.

The Member: Can you locate that in time a little more specifically? That is to say, beginning in 1929 and coming right down to date, can you be more specific as to the progress of the thought about holding cash?

The Witness: Well, I would say that the desire to hold cash kept on the increase, certainly from the end—well, let us say from the beginning of 1930, because at the beginning of 1930 there was a slight upward swing which made people feel a little more optimistic, but, let us say, from the beginning of 1930 right through 1933, when we really reached sort of bottom in that sentiment—I suppose that is hard for me to say, just when sentiment on the whole improved, but it was sort of dragging along bottom, there for a couple of years, and then, we will say, the sentiment has improved since then.

Does that give you my general views?

The Member: Yes.

The Witness: All right.

A. (Continuing) I was going to say that then I looked at this picture from a consolidated earning viewpoint. In other words, I didn't think it was sufficient just to take the earnings of the Maine Company alone because, after all, this is really one enterprise and if I had been a director of the Maine Company I would want to see how the whole

picture stood, so I took the earnings of 1930 and found out that the consolidated net income of 1930 was $3,697,070.60.

Included in that earning power were the earnings of the Central Manufacturing District, which was never able to pay out money, but which, rather, was requiring money all the time, so I deducted those earnings of $289,403.32 and left a possible combined earnings of the enterprise of $3,407,667.28.

I might mention that if I remember correctly, the Central Manufacturing District in that year had to be provided with a million dollars in order to pay off maturing obligations, so that, certainly, none of their cash was available.

Now in that year, also, there were non-recurring profits on securities which the Maine Company held of $614,047.21. That figure I got from the income tax statement; not a normal recurring profit of the corporation of the enterprise which left $2,793,620.07.

Then again, the bank troubles, you see, were wholly on the horizon, and the Maine Company had to make a subscription to the Stock Yards Bank of some $464,000 of stock and took up from an affiliate of the Stock Yards Bank a hundred thousand dollars of frozen bonds, a total of $564,000. That would reduce the ready cash to $2,229,620.07.

From this the preferred dividend on the Jersey Company stock was paid of $387,339 and common dividend to minority holders of $55,689.75, a total of $443,028.75, which would leave a balance of $1,786,591.32.

Now from that later figure, as shown by these charts, from the beginning of 1930 for that 10 years there was still $12,000,000, which it was certainly advisable to accumulate or set up, a so-called amortization charge of $1,200,000 a year. They hadn't been able to even live up to a million,

but if the earnings continued all right they would have to get a million two if they were to keep the picture.

If you take off that amortization charge you would show earnings of the consolidated net income of $586,591.32 as *against the dividend that was paid of some $400,000.*

Of course I can't help but feel that any director with that picture confronting himself would have said this $400,000 was a very fair dividend to pay at the end of 1930, knowing conditions as they existed at that time.

Now I worked up similar figures for 1932 and 1933. The 1932 consolidated net income was $4,082,105.36 from which I deducted the earnings of the Central Manufacturing District, as before, of $207,492.82, leaving a balance of $3,874,612.54.

Now during that year the Maine Company had to put deposits into the Stock Yards Bank which almost immediately became frozen, of $3,071,779.19, which left available cash of $802,833.35.

If you deduct from this the preferred dividend on the Jersey stock for that year of $381,600 and deduct the common dividend on the minority stock of $47,387.25, or a total of the two of $428,987.25, leaves you a balance of $373,846.10.

Now that is not even the amount of the common dividend that was paid.

In those figures no allowance is made for the amortization, as I call it, of the $1,200,000 a year, and on top of that I might say that of the consolidated net income of $4,082,000, about $2,000,000 of it was profit from former years which just happened to come into this year of money that had been impounded in previous years, so, certainly, 1932 was a pretty sad looking year from an earnings standpoint, if you are going to look at it from the dividend viewpoint.

1933, unfortunately, was still sadder. The consolidated

income was in the red $84,165.79. That included the earnings of the Central Manufacturing District which were $237,932.62.

As those earnings weren't available, the company was really short that year of $322,098.41 before the payment of the Jersey preferred dividend. If you deduct the Jersey preferred dividend of $379,998 and the dividend to the minority common stockholders of $45,414, that is a total of $425,412, you have a red figure of $747,510.41 with nothing, of course, available than those figures, either for dividend on the common or for the so-called amortization that I talked of of a million two, and, as I remember it, in 1933 also they had to pour, really, millions into the banks on top of that, so that the cash situation from the earning viewpoint was not particularly pretty.

Fortunately, the company was in the cash position where it was able to take care of these banks and I have said to Mr. Prince I took off my hat to him for being so conservative to have the cash so that he could take care of the bank, but I think that about tells the story, the way I would look at this picture, as a director or an investment banker.

Q. 27. (By Mr. Welch). One other thing that I think your views might be of some help to us on, and that is on your judgment as to whether or not the Jersey Company should be liquidated in 1940. *A.* I feel very definitely it should be. That is, it is the spirit of the times of having holding companies on top of holding companies, but it is an unpopular form of finance, and, any structure today, better from the credit viewpoint.

Q. 28. Have you had occasion, Mr. Walker, to discuss with Mr. Prince what he was doing in the Maine Company and his reasons for doing it at any time? *A.* Yes.

Q. 29. On what occasion, sir, and what years? *A.* Well, on and off, I suppose, the last 10 years.

Q. 30. Will you tell His Honor what, if anything, Mr. Prince has said to you about what his plans were? *A.* Well, there is no question that his plan was to liquidate the Jersey Company. He has told me many times that his theory was to get rid of the intermediate company, that he wanted to hold onto cash, particularly in the last seven or eight years, because he was very fearful—frankly, I felt he was too blue on that point—but he said, "No, I am going to hold onto cash, and I am going to keep cash as near as I can in one pocket, because then I am going to know where that cash is." He was always worried about the possibility of bank trouble, and he was just going to keep his cash in as strong a bank as he knew how to keep it and be conservative, indeed, in the extreme.

Q. 31. Did Mr. Prince ever say anything to you about his ambition in respect to the company, how he wished to leave it? *A.* He wanted to leave it as an empire, is the way he expressed it to me, and he said, "I don't want this thing torn down at my death; I want to have this—I have worked all of these years of my life to build up this monument or empire, and I want it to be in A-1 condition and survive, at least, through another generation."

Mr. Welch: You may inquire, Mr. Clark.

Mr. Clark: Just a moment, Your Honor. (Counsel for Respondent confer.)

Mr. Clark: I am sorry to take this time, Your Honor, but it is very difficult for me at this point.

Cross-Examination.

X-Q. 32. (By Mr. Clark): Mr. Walker, in the record there is an allegation that the Maine Company must retire or pay off the obligations of the New Jersey Company and its subsidiaries by the year 1940. Is that your understanding of the situation? *A.* There is no compulsion, but

there are maturities which the board of directors would have to take into consideration in their financial dividend policy.

X-Q. 33. But it is your understanding and the result of your investigation that there is no compulsion on the Maine Company to retire those obligations? *A.* No. As I said, the directors of the Maine Company could have chosen the course of paying everything out and having nothing left at the maturity, which, in my opinion, would have been most unwise and unsound.

X-Q. 34. Have you considered what has been referred to as the contract of 1914, which I believe is Exhibit S-46 attached to the stipulation? *A.* Yes. I have considered that.

X-Q. 35. And what is the result of your consideration relative to that?

Mr. Welch: Oh, that is an odd question. The result might have been that he had a red face or a headache, or anything else.

Mr. Clark: That is right, too, and let the witness answer if he can't understand the question.

Mr. Welch: I object to the question. I think it is too broad. I don't understand it.

The Member: I will sustain the objection.

X-Q. 36. (By Mr. Clark). Have you taken into consideration the question whether or not Mr. Prince or F. H. Prince & Company, Inc., had any interest or any obligation to see that these New Jersey Company bonds are met or that some method of refinancing or reorganizing is effected in 1940? *A.* Yes; I have given consideration to that. I think they had a decided interest to see that this maturity was met.

X-Q. 37. No obligation but an interest? *A.* Whether or not the Maine Company had an obligation, I am not lawyer enough to say, but I could conceive that the directors of the Maine Company might have found themselves in a very awkward situation if they had taken the extreme means of pay-

ing out everything and leaving a shell. I think they would have found stock owners', preferred stockholders' suits and even bondholders' suits, and what not.

X-Q. 38. My query related to Mr. Prince or F. H. Prince & Company, Inc., and not the Maine Company. A. Well, Mr. Prince, I imagine, was a director of the Maine Company. That is the reason I mention that, that he would be the principal source of attack, probably.

X-Q. 39. Do you know as a result of your investigation in connection with the preparation for testifying here or from any other source how Mr. Prince was investing his personal funds during this period from 1930 to 1933? A. I know very little, if anything, about his personal investments. I never did any investing for him.

X-Q. 40. You wouldn't know whether he invested a million or two million dollars or some other similar sums in stocks or securities during this period? A. I know nothing about his private business.

X-Q. 41. Do you have before you this chart, which is Exhibit 45? A. Yes, I have.

X-Q. 42. Will you please refer to it for a moment, Mr. Walker? A. Yes.

X-Q. 43. Now, referring particularly to the year 1919, if you were faced with a situation as appears on the chart as of that year, would you have increased your holdings in the common stock year after year and during the subsequent years have loaned millions to the stockholders or the stockholder?

Mr. Welch: Objection. That is a double-headed question. That had better be split.

Mr. Clark: Well, I will split it.

X-Q. 44. (By Mr. Clark). Faced with the situation as appears from the chart in the year 1919, would you have in-

creased your holdings in the common stock of New Jersey Company year after year? A. Yes, I would have.

X-Q. 45. And why? A. From the viewpoint of the Maine Company it was most important to get that ownership so as to have, if possible, complete ownership at least by the end of the charter. Otherwise, the whole proposition would have been broken up into various parts in 1940 to a lot of minority stockholders.

X-Q. 46. Do you know whether or not in the years subsequent to 1919, or let me ask you this:—strike that, Mr. Reporter.

Do you know who the stockholder was of the Maine Company in the years subsequent to 1919? A. I don't know, but I presume that Mr. Prince was.

X-Q. 47. Do you know whether or not Mr. Prince during those years borrowed money from the Maine Company?

The Member: From the Maine Company?

Mr. Clark: Yes. A. Why, the records show that in certain years—I haven't the records before me—that Mr. Prince did borrow certain money.

X-Q. 48. (By Mr. Clark): Have you considered that fact? A. In my report here?

X-Q. 49. Yes. A. Yes.

X-Q. 50. Do you think that was a sound policy? A. I think it was a very natural and sound policy because Mr. Prince was a man of wealth and his note was good. He could borrow, I am sure, at the banks if he didn't borrow from his corporation, and probably saved interest for the corporation by borrowing it rather than just leaving the money on deposit.

X-Q. 51. Of course your career in Wall Street has been very extensive, Mr. Walker, as you have testified, and I appreciate it. During that career have you at any time known a corporation which had as large assets and earn-

ing power as the Maine Company which could not in normal times refund its maturing obligations? A. Well, I have known of plenty of companies that have had great difficulty in refunding obligations.

X-Q. 52. That is—pardon me. A. It depends on what you mean by normal times. It depends what the original financing of the company was. I mean, there are plenty of companies that have been just put together without banking support and issued a lot of securities which have certainly been unable to be refinanced at the maturity of those securities.

X-Q. 53. Well, this company you consider to be in a very sound condition, wouldn't you, during the period 1930 to 1933? A. In that particular period this company was sound.

X-Q. 54. Well, has there been any period in which it wasn't sound in your opinion? A. I don't think it was so sound when it started out, no.

X-Q. 55. When was that? A. 1911. It guaranteed and only had a million dollars in the treasury. I wouldn't call that sound.

X-Q. 56. When do you think it became sound? A. I haven't pretended to study just what year, but you have asked me specifically. It became—it got into a period of soundness when its income was materially increased from the New York Central lease. That is really when it—

X-Q. 57. Do you remember when that was? A. Well, what is that? I think it was 1923. I am not sure.

X-Q. 58. Can you tell me, Mr. Walker, what rate of interest large industrial companies of large and relatively stable earning power have been obliged to pay on bond issues sold by the firm of which you are a partner during the last year or two? A. Well, it varies plenty on the maturity and character of the borrower. Loans from one to five years

of outstanding companies have been made, say, at an average rate of, oh, around 2½ percent by the banks. Ten-year loans, I suppose, have been made, with the very best credits, at an average of 3 percent. Your very top companies have done even better on some of their longer term securities. I mean, maybe even 2¾ percent on a ten, or even in exceptional cases 15-year maturity. But that market is twofold, one for the longer term ones, it is the insurance companies, and for the shorter term ones, it is the banks.

Now, of course, the insurance companies are a very special character of buyer, and we are unfortunately in a market where the top companies which the insurance companies can and will buy the securities of command tremendously high credit. On the other hand, if you get out of that class, it is a very difficult problem today, very difficult. The investor has very little money to invest. If he has it, he either seeks tax exempts or withholds because of lack of money really to invest. Money has gone primarily into the banks and insurance companies.

Does that cover your question, Mr. Clark?

X-Q. 59. I think so, Mr. Walker.

Now, in this regard, have you given any consideration to refinancing the Railway Company on which there was a net income—no, I will strike that last.

—on which there was a net income to refinancing the Railway Company? *A.* I thought of the Railway Company.

X-Q. 60. What was your thought relative thereto? *A.* Well, you can't consider refinancing the Railway Company for a large amount and having that sum of money pass up through upstream loans to the parent corporation, because it just wouldn't be permitted by the I. C. C. or by, I am afraid, even by law.

The Member: Even by what?

The Witness: By law.

X-Q. 61: (By Mr. Clark). You recall the terms of the New York Central lease? *A.* Yes, in general.

X-Q. 62. And the amount of income which came from that lease? *A.* Yes.

X-Q. 63. And that was how much? *A.* Two million dollars a year.

X-Q. 64. You have taken that into consideration in arriving at the answer which you have just given? *A.* Yes, from the Railway Company. You asked me about financing the Railway Company.

X-Q. 65. That is right. Have you taken into consideration whether or not the New Jersey Company could sell or borrow on its stock of the Railway Company? *A.* I have taken that into consideration, yes.

X-Q. 66. What is your conclusion in that regard? *A.* If you keep the Jersey Company alive which, No. 1, I think is inadvisable, but subject to keeping it alive so you could use the credit of the Jersey Company to borrow on what is really the revenue of this $2,000,000 lease—I take it that is in effect what you mean, Mr. Clark?

X-Q. 67. Yes. *A.* You might arrange a short-term loan at banks for a reasonable amount, which would be refunded—or, not refunded, amortized very quickly. I think every one realizes that the New York Central's credit unfortunately since 1929 has not been of the best, and there has always been some question raised—I know I have raised the question many times in my own mind during the past six or seven years, whether or not that lease was really a good lease, whether it could continue. I have often spoken to Mr. Prince myself about it, because I had a little concern as to how it might affect him in case that lease should fall due to receivership or otherwise. So you haven't got their first class collateral. You have got a dubious class of collateral, and I don't think you could sell a bond to the public at a

satisfactory rate. I am sure you couldn't sell it to an insurance company. But I do think in an emergency if you had to borrow a reasonable amount of money at a bank payable over one, two, three years with the general credit of the Jersey Company attached to it, that you could borrow a certain amount of money in time of need.

X-Q. 68. Do you know whether or not Mr. Prince was concerned as to whether that lease might fall through as a result of receivership or some other reason? A. Mr. Prince was always an optimist. He always saw the bright side as far as his own company was concerned, and he would always take the attitude with me that, oh, if they don't want it, others will take it. But, personally, I know that in life—

X-Q. 69. No, I have only asked you—

Mr. Welch: He hasn't finished his answer.

Mr. Clark: Not any statement as to what he personally knew. I just asked him if he knew what Mr. Prince's attitude was.

Mr. Welch: I beg your pardon. My associate says that he has answered it.

The Member: I just want to have you go one step further about this matter of borrowing on the lease. As I understood you, you said that you could borrow a certain amount of money on that lease. What can you say in respect to the period of time for which you could borrow on the basis of that lease? Would it be just a short-term loan or could you refinance it for any substantial length of time?

The Witness: I don't think you could for a substantial length of time. By "short term" my offhand thought was that, say, suppose you needed $5,000,000, for example, and in a pinch, and you went to the bank and said—let's figure, for example, we are in 1940. Perhaps I can explain it better. And suppose between now and 1940 for some reason

or other the Maine Company needed $5,000,000 to provide a balance of moneys that might be necessary to pay off these securities and to give it additional working capital, because you will note in my figures I have only allowed for all moneys to be paid out. I haven't left any moneys for working capital. So suppose they needed $5,000,000. I think it probably could go to the banks with that lease, if conditions are no worse than they are today, as an obligation of the Jersey Company and maybe get one, two, three millions in money, something like that, that you would, say, pay off a million and a half or so each year, something of that nature. That plus the other assets of the Jersey Company. That is my offhand opinion as to the value of that lease.

The Member: Well, I take it by that you mean more or less emergency financing?

The Witness: More or less. Of course, when I say "emergency" I don't mean emergency in the sense of times being terrible, but I mean the fact that the company didn't have quite enough money to meet its obligations plus additional working capital which the corporation would need. I can well see even today that in 1940 this corporation may need to borrow—that is, this enterprise as a whole may need to borrow a certain amount of money to provide itself with proper working capital after paying all these subsidiary obligations and stocks, and so forth.

The Member: Well, changing the word "emergency," in order to think about borrowing money upon this, you, I notice, are setting up an imaginary particular occasion.

The Witness: Yes.

The Member: Now, I want to know whether this could be used as the basis of more permanent or established financing over a period of time rather than the mere means of

providing funds to finance a particular occasion whether it be emergency or not. Do you get my thought?

The Witness: I get your point, Your Honor.

The Member: There may not be any sense in it.

The Witness: No, I get your point, Your Honor. But I think we must define then whether the Jersey Company is to continue to exist or not. In other words, just what collateral am I going to have to offer for financing if I had to finance it? Will I consider the Jersey Company as still alive with an extended charter, or will I take the Maine Company with the Jersey Company out? I don't want to make a hypothesis and then find that I am wrong. Which would you prefer?

The Member: Well, I don't care. I am trying to learn what is your mode of thought and what are the considerations which you think must be given place in the thought of refinancing or financing on the basis of this lease. I want to get elucidation from you, and that is all I care about, and if you have got to take it on two alternative bases, that is all right, and, as far as I am concerned, you have said all you need to say.

The Witness: Well, on that, all I could add is that my mind has worked along always on the theory that the Jersey Company would cease to exist in 1940 because that has been so often told to me by Mr. Prince, that he wanted to get rid of it, so I have taken it for granted that the Jersey Company would not be—would be non-existent when the time came for the payment of these obligations, and, naturally, the one thought would come to my mind, and that is, well, suppose the Maine Company then needs additional money? How much can it get? How could it finance it?

No. 1; it must be based on normal times, no war, no panic, which none of us could say today might not exist. But if the times were normal in 1940, the Jersey Company

wiped out, the Maine Company then owning directly the stock of these principal subsidiaries including the Railway Company, including the Transit Company, the C. M. D., and the Produce Terminal with earnings approximating the present-day earnings, I think it would be possible to finance a reasonable amount. It is hard to say just how much, but everything normal it might be financed ten millions, maybe even slightly more, but as to rate, the rate that would have to be paid, as to whether or not those securities would have to be made convertible into something, in other words, have an attraction over and above the ordinary interest rate, I think it would be necessary in this type of securities—it is not a security that an insurance company would buy at all; it is not a security when you talk about long-term securities that the banks will buy; it must be sold to the investor—it would be a very difficult job and have to pay a very good rate of interest, and none of these rates that I have been talking about of 3 percent, or nothing like that. I mean, it would certainly be in the five or six percent class, and would have to have a real attractive kick, as we call it, in Wall Street attached to it. But those are all hypothetical, and I don't think, frankly, one would be justified in running too great a risk as to whether or not that could be done, because it is bad enough to look forward from day to day rather than from year to year nowadays.

Mr. Clark: One moment, if Your Honor please. (Counsel for Respondent confer.)

Mr. Welch: If Your Honor please, the cross-examination ended once. This is quite all right except I know Mr. Walker has important engagements in New York and I hope we can finish before adjourning.

Mr. Clark: I hadn't realized it was ended, but I shall have only a little more, just a moment or two.

X-Q. 70. (By Mr. Clark). Referring to Exhibit S-46 relative to which you have already testified, the lease—I am wrong, apparently, in referring to it as S-46, it is Petitioner's Exhibit 2. That is the lease of 1922 between the Chicago River and Indiana Railroad Company and what is referred to as the Railway Company, here. A. Yes.

X-Q. 71. In which the New York Central is grantor. Have you familiarized yourself with the earnings of the Chicago River and Indiana Railroad Company? A. No; I have only been familiar with the earnings of the New York Central.

Mr. Clark: That is all.

Mr. Welch: That is all, Mr. Walker. Thank you. (Witness excused.)

Mr. Welch: These are quite happy words for me, Your Honor: They are, I rest; the Petitioner rests.

The Member: We will suspend, then, until 2 o'clock.

Mr. Clark: May we not suspend until quarter past two, Your Honor?

The Member: All right, we will suspend until 2:15.

(Whereupon, at 12:40 o'clock p. m., the hearing was recessed until 2:15 o'clock p. m. of the same day.)

Afternoon Session.

The Division resumed hearings at 2:15 o'clock p. m. whereupon the following proceedings were had:

Mr. Clark: If Your Honor please, the time has come for the Respondent to put on its case.

I am in this situation, which I have discussed with Counsel for the Petitioner: The witness whom I expected to put on first is still out of town and in Chicago. Now, I can't offer any reason therefor and if there is an objection I will have to go ahead as things are.

However, we only have a couple of hours this afternoon.

We will have to go into next week, anyway, as I understand, for if is my understanding, if it is correct, that Your Honor is not going to sit tomorrow?

The Member: That is correct.

Mr. Clark: And I understand that there is no objection on the part of the Petitioner to our going over until Monday, with the understanding that we will put in quite a bit of evidence which we have here, documentary evidence, this afternoon.

I don't know how long that may take.

Am I correct, Mr. Welch, in what I have said?

Mr. Welch: Of course, nobody on this side of the bench can guide our conduct, but I am free to say that I am somewhat tired.

It is my guess we will use a good deal of the afternoon in regard to what is being offered, and I can only state that I am enthusiastically in favor of your motion, Mr. Clark, but I know that it finally rests with His Honor.

The Member: I take it there isn't any occasion for me to say anything, now. You have got some evidence to carry along with and it may be at that time it would seem to be convenient to suspend over the week end there will be occasion for me to say something, and when it does I am not going to be insistent about going ahead, but as long as you are going ahead for the moment there is nothing for me to do now but to hear what you have to present.

If you want an assurance I am not going to be insistent I can give you that assurance. I am not going to be unreasonable. Whether it is unreasonable or not, I will tell you when it comes time to decide.

Evidence on Behalf of the Respondent.

Thereupon, the Respondent, to maintain the material averments on his behalf, introduced the following proof:

Mr. Pierson: If Your Honor please, in the presentation of the Respondent's part of the case, I offer in evidence at this time a series of sheets of paper which are Mr. Green's notes and upon which he has constructed his figures regarding the Petitioner's Exhibit 45 which was introduced in evidence this morning.

I understand there is no objection to that.

Mr. Welch: I think it is only fair they should go in evidence.

The Member: They will be received.

Mr. Pierson: I am advised by my associate that there are 23 sheets.

The Member: That is the original, is it?

Mr. Pierson: No, it is not, Your Honor. I notice it is a copy.

The Member: Is the original available?

Mr. Green: I can't, for the life of me, locate it, Your Honor. I don't know where it is. I have a carbon copy myself and this is another one.

Mr. Pierson: I might state it is very legible.

Mr. Green: It is on heavy paper; it is not on onion skin paper.

The Member: Off the record.

(There was a discussion off the record.)

The Member: On the record.

(The documents so offered and received in evidence were marked "Respondent's Exhibit C," and made a part of this record.)

Mr. Pierson: I now offer in evidence seven sheets consisting of the revised balance sheets on the basis of the stipulated adjustments. Those balance sheets covering the years 1929, 1930, 1931, 1932, and 1933.

Mr. Welch: Could I ask, Mr. Pierson, if they have been examined by Mr. Keelan or Mr. Green?

Mr. Pierson: I understand they have, Mr. Welch. I offer those at this time.

Mr. Welch: There is no objection.

Mr. Green: What dates are those?

Mr. Pierson: Ending December 31, 1929, 1930, 1931, 1932, and 1933, consisting of seven sheets.

Mr. Welch: Mr. Pierson, are you in a position to give us copies of those?

Mr. Pierson: We will have copies made of those, Mr. Welch.

Mr. Welch: Thank you. So that we may have them over the week end, if there is any interest in them?

Mr. Pierson: We will attempt to.

The Member: Will you read that offer?

(Statement read as follows:

"I now offer in evidence seven sheets consisting of the revised balance sheets on the basis of the stipulated adjustments. Those balance sheets covering the years, 1929, 1930, 1931, 1932, and 1933.")

Mr. Pierson: If Your Honor desires, I will state the companies that that covers.

The Member: No, I was just wondering whether the offer indicated who made them or how they came into being. If there isn't any question about them, all right.

(The documents so offered and received in evidence were marked "Respondent's Exhibit D," and made a part of this record.)

Mr. Pierson: I offer in evidence a summary of the differences in the taxes paid by F. H. Prince and F. H. Prince & Company, Inc., and the taxes which have been due and payable if the Petitioner, the Chicago Stock Yards Company, has distributed its annual profits for each of the years 1930, 1932, and 1933.

The Member: All of its annual profits?

Mr. Pierson: That is correct, Your Honor.

Mr. Welch: It is going to be offered?

Mr. Pierson: No, there is another offer to go along with that.

Also the summary of the differences in the taxes paid by F. H. Prince and the Frederick Henry Prince trust and the taxes which would have been due and payable if the Petitioner, the Chicago Stock Yards Company, had distributed its annual profits for each of the years 1930, 1932, and 1933.

Mr. Welch: To those offers, I object. You said there were going to be two offers? I understood—

The Member: I think they had better be offered separately, in any event. They involve different things, apparently.

You are offering the first two things that you mentioned?

Mr. Pierson: That is correct, Your Honor.

The Member: You have an objection?

Mr. Welch: I object.

The Member: What is it?

Mr. Welch: I am advised by my associates that the arithmetic is correct. The objection is based on this ground: The computation is offered on the assumption that every cent of profits should have been distributed. I don't know what the testimony is going to be, but I can scarcely imagine that there will be testimony to support that theory. Secondly, the most that could be said for these figures is this: That if every cent of the profits of the Maine Company had been distributed, Mr. Prince's gross income would have been increased by that amount. Certainly, there is no telling what he might have done in the way of taking losses to offset his income had that happened. So the thing seems to me so speculative at both ends that no good purpose is served by having it put in evidence with all the dignity of an exhibit. If my brother wishes to construct such

figures in a brief and argue about them, that is one thing, but I object to their admissibility in evidence.

There is a third reason that I want to call to Your Honor's attention, and that is this: It would be easier for me to talk about my objection if Your Honor looked at the sheet that is being offered, and there is not the slightest objection on my part to your doing so.

(A paperwriting was handed to the Member.)

Mr. Welch: If Your Honor will look at the second column "Difference of H. Prince & Company, Inc.," you will find that on some theory my brothers have inserted rather huge figures there. I judge that it is based on the assumption that a personal holding company—well, I am only guessing at the theory. Perhaps the theory is that again there were accumulations in that company and a tax imposed. In any event, so far as I can see, the only tax that should have been imposed is the one in the third column, and I could see no understandable basis for these rather huge sums that appear in the second column.

The Member: I notice that the exhibit, proposed exhibit, is called a summary of the differences in taxes paid and the taxes which would have been due and payable. Now, that imports so much of law that I think the exhibit is clearly inadmissible in so far as it does purport to include a statement of a hypothetical legal liability imported by the terms "Due and Payable" without a very complete statement of the basis upon which that appears. In other words, the exhibit is either worth something or nothing. It is worth nothing until there is a complete elucidation of everything upon which it is based. I take it, furthermore, that the returns of F. H. Prince and of F. H. Prince & Company, Inc., are not in evidence, are they?

Mr. Pierson: No, Your Honor, but they will be placed in evidence.

The Member: I should think that the most you could do —perhaps not the most, but I should think what you might do is to take the returns of those two individuals, which must be in evidence if they are to be taken, and then I should think that you could introduce in evidence a computation of the tax figure which would be substituted if the gross income shown on each of those returns were to be increased by a pro rata distribution of the Petitioner's entire earnings and profits, because that is merely a mathematical figure. You have got "X" on the return, and if you have "X" plus "Y" the tax would be so and so as computed by any income tax auditor in the Income Tax Unit. I shouldn't think there could be any objection to that. If this proposes to include all of the meaning of the words "due and payable," I should think you would have to exclude it.

Mr. Pierson: Well, if Your Honor please, in connection with that offer, we have had prepared a computated detail upon which those differences are based.

The Member: Well, then, perhaps you had better proceed the other way around. Let's see piece by piece what your structure is, and when we come to the ultimate summary it may be that you can establish its admissibility. I don't know.

Mr. Pierson: In connection with the summary contained in the first column, the differences on the taxes of F. H. Prince, I have a computation of the net income reported on the return less the office adjustments and other items of income adjusted by audit, to which is added the distributable income of the Chicago Stock Yards Company. And in connection with the distributable income, there is a schedule thereto attached which shows the computation of that distributable income, which goes to make up the summary that is referred to in the first column. And in

connection with that it gives credit for the taxes which have been previously assessed on the return, leaving the net difference, which is referred to in the first column. And that has likewise been done, Your Honor, with regard to the computation as the Respondent has computed it with regard to F. H. Prince & Company, Inc.

The Member: Has your adversary seen that?

Mr. Pierson: Yes, that has been checked by Mr. Keelan.

The Member: Have you any objection to that?

Mr. Welch: As to the arithmetic, I am advised by Mr. Keelan it is correct. I still have this difficulty, if Your Honor please—

The Member: The arithmetic doesn't mean very much. If you simply mean by arithmetic, the addition of one sum to another and the sum to be derived from it, that is arithmetic, if that is all you mean the extent to which you are willing to admit it.

Mr. Welch: That, of course, I agree to, but I still have this difficulty that I have pointed out. These computations bother me on this ground: That we go through this formal business of asserting that someone's tax would be so much larger if his gross income would be increased by so much, and that is unsatisfactory. If we went back to that year and Mr. Prince took this additional income, nobody knows what he might have done by way of sales for losses, or anything of that sort.

The Member: But that is always true of mathematics. You have got to act on certain assumptions, and, as I understand it, the assumption here is that everything else would be exactly the same except—everything would be exactly the same except the gross income. Now, there is no harm in putting mathematical calculations into the record which shows that if his gross income was "X" his tax will be thus and so, and if his gross income was "X" plus three, his

tax will be thus and so. Now, that is as far as I understand this goes, isn't it, Mr. Pierson?

Mr. Pierson: That is correct, Your Honor.

The Member: So if that is the only objection you have, I will overrule that objection and receive the exhibit.

Mr. Welch: Now, that disposes only of the first column. It doesn't dispose of the second column of the offer. I should like to understand better than I do at the moment how the second column is arrived at and on what theory.

The Member: If there is any doubt about that, it must be done in the orthodox way. It doesn't make any difference what counsel at the table say about an exhibit because what they say is not evidence. If there is any doubt about the authenticity of the figures which are used, in the first place, because the return is not in evidence, or something of that sort, we must have a witness who will state the factual bases upon which the exhibit is constructed and submit himself for cross-examination. If, however, there is a disposition on the part of counsel to make an agreed statement of facts which can be obtained as assumed or imported into this exhibit, why, that is entirely a matter for you to do. I mean, you can't do it this way by not putting a witness on the stand and then arguing about whether the exhibit is to go in.

Mr. Pierson: I understand that, Your Honor. Of course I have been advised by my associate who did the auditing work on this, that he had conferred with Mr. Keelan in that regard, and that this was, so far as that phase of it was concerned, an agreement as between the parties.

The Member: Yes, but the man whose agreement you want to get is Mr. Welch, because this has got to come up to a peak where the responsible counsel is the one to talk, and I am discussing now the objection which Mr. Welch

has made and nothing that Mr. Keelan may have agreed to in the lower reaches is going to touch that.

Mr. Welch: I don't mean to say that I am making merely captious difficulties and requiring a witness to be called to testify to something that we all know he would testify to. I just want to be sure that this second column has an understandable basis and makes sense. I can't at the moment see that it does, and it doesn't seem to me material.

Mr. Pierson: Well, Mr. Welch, in connection with your discussion with Mr. Keelan, you have been notified of the method of computation that is used in this exhibit here; have you not?

Mr. Welch: I have been told by my associates that you have actually applied a double 104, which seemed to me shocking. That is all that I understand about it, sir.

Mr. Pierson: If Your Honor please, it seems to me, in so far as that phase of it is concerned, the computation as it is here made is made under the Respondent's theory of the method by which this should be computed if the income of the Petitioner Corporation hadn't been distributed, and the application as my opponent states of 104 as we view it the method by which this should be computed.

The Member: Well, after all, if it is going to be in evidence it is no good unless it is factually accurate. No kind of a mathematical computation is evidence of anything. What you want evidence for is the establishment of facts.

If there is any doubt about this I would leave it out, because unless it is helpful, unless it is useful, there is no place in the record for it.

If there is doubt about that, what good is it? It does not answer anything, really, to say that this is what the Respondent thinks is right because that is what every litigant thinks.

Mr. Pierson: I will withdraw the offer at this time and see if between counsel I may have the right to offer it at a later date.

The Member: All right.

I will say this, and I will say this to both of you, in order that you may know how to proceed: There has been enough said in these section 104 decisions to indicate that the extent of the saving to the shareholders of tax by reason of the non-distribution is a significant fact, and if that extent can be clearly and accurately demonstrated by a simple exhibit of a mathematical computation which does not contain questionable matter and which does not involve a lot of argument as to its proper rationalization, there is good place in the record for that type of demonstration, but in order to be of any use at all it has got to be free from argument as to the method and factors of its construction.

With that much before you, I feel perfectly certain that with all of these learned counsel on both sides of the table in this case you can agree upon a figure.

Mr. Pierson: We will attempt to do that, Your Honor.

The Member: All right.

Mr. Pierson: I offer at this time a schedule consisting of the securities sold by F. H. Prince & Company to the Petitioner, the Chicago Stock Yards Company, in the years 1931, 1932, and 1933, showing the cost, the selling price thereof, and in the last column the loss claimed thereon and at the bottom thereof is the statement that the above stated losses were claimed by F. H. Prince in his income tax return for the years 1931, 1932, and 1933, and were allowed by the Commissioner in the final closing of the determination of his correct tax liability for said years.

I understand, Your Honor, that there is no objection on the part of the counsel in so far as the figures and amounts

stated and statements contained in this document is concerned.

Mr. Welch: That is correct. Those sales took place and at those figures, with those resultant losses.

I guess it is my turn to speak.

I am just unable to see what materiality it has on the question of a man's intent to avail of a corporation to avoid surtaxes, and I will object to it as immaterial.

The Member: I will overrule the objection.

(The document so offered and received in evidence was marked "Respondent's Exhibit E," and made a part of this record.)

Mr. Welch: Could I have an exception noted?

The Member: Yes.

Mr. Pierson: If Your Honor please, without stating each time an offer is made, these documents which I will now offer in evidence, I understand Counsel agrees to the facts and figures and statements contained therein.

Is that true, Mr. Welch?

Mr. Welch: Yes, if you are talking about what I think you are.

Mr. Pierson: When I say "these documents," Mr. Welch, I mean to say the 1934 to 1937 income and balance statements of the respective corporations in the family group.

Mr. Welch: Yes.

Mr. Pierson: I offer the net income statement, dividends paid, and other data of the Union Stock Yards and Transit Company of Chicago together with Schedule A, covering the years 1934, 1935, 1936, and 1937.

Mr. Welch: If Your Honor please, I guess I heard the barn door lock on this the other day, but in spite of what Your Honor said, I carefully tried my case within the limits of the taxable year.

Your Honor will observe our charts end at 1933, our tes-

timony ends at 1933, and I am frank to say that some witnesses just will not re-appear.

I object to this because I think it is immaterial and because it is curiously awkward for a Petitioner to put in a direct case which I believe is on the correct basis, limiting himself to the years in question and then have the Government, so far as I know, reversing the position that it has always taken, that being that usually the Petitioner wants the later figures and the Government objects.

In the Grocery case to which I conceive this case to be a very close parallel, the petitioner sought to show the later years, the Government objected, the Board Member said it was his view that the later years were perfectly immaterial. I used the curious phase for the sake of the record, I will admit.

We have got a lot of record here and I don't think it does the record much good to have them all admitted and it clutters up my mind and clutters up the case and I admit it irritates me, and having said all that I will add the simple words "I object" to these particular documents.

The Member: What is the significance in the record, Mr. Pierson? What is the significance to this case?

Mr. Pierson: There has been a good deal of testimony with regard to the trial of this case with respect to this condition which has arisen and which will arise in 1940 and in computing and compiling the situation of facts to which we went to great trouble. It is true we cut off the taxable year 1933, our last taxable year, but the Respondent feels, in the light of the petition, the Petitioner has taken in this case with respect to these existing obligations which will fall on our taxpayer in the taxable year 1940; we have endeavored to compile this additional data to show the standing of the corporation on and after our taxable years through the taxable year 1937, which was the last one we were able to obtain

data, so far as we have amended the balance sheets or changed them from our own records.

As they appear, they are the balance sheets and net income statements taken from the respective books of the corporations.

The Member: Now from the standpoint of the Respondent, what do these exhibits tend to show which helps his defense?

Mr. Pierson: They are in rebuttal, Your Honor, of the impression that I believe has been attempted to be put before the Board as to all of this necessity of having to pay off those obligations in the later years.

It shows the respective condition of these corporations.

The Member: What, concretely, does it show upon which you can base an argument, because if you can show me anything upon which a reasonable argument can be predicated which will sustain or help to sustain the Respondent's determination, I would be disposed to let it in, but I want to know before that how it does operate in that respect.

Mr. Pierson: Well, Your Honor, please, we expect to argue and attempt to show that this condition which has been stated to the Board as arising in 1940 is of little or no moment by virtue of the statement of the corporations as they continued to exist on up through the years, particularly as to the earnings in those years.

The Member: What does it show in that respect; that the earnings increased and irrespective of this building up of a reserve that in 1940, they were, nevertheless, going to be able to liquidate as they thought they would; that sort of thing?

Mr. Pierson: That is correct, Your Honor, and that the earnings of the respective corporations were substantial throughout these years, and that those earnings might be

taken in the last five years and satisfy the obligations on the bonded indebtedness at that time.

The Member: I will overrule the objection.

Mr. Welch: Will Your Honor save my exception?

The Member: Yes. All you need do is say you except. There is nothing I can do about it.

Mr. Welch: I would like to add one other word, maybe for amusement, no 104 in the succeeding years will be made. The assessments have been made on another theory, is the real answer, and it seems now to me that the Government takes the position that we did unreasonably accumulate in the later years and yet were assessed on another theory and offers this additional evidence on that theory.

The Member: That anomaly may all resolve when you hear these gentlemen present their theory.

Mr. Pierson: I believe the offer was made on that; that was with regard to the Union Stock Yards and Transit Company of Chicago.

The Member: That is right.

I overrule the objection, which means the exhibit is received.

(The document so offered and received in evidence was marked "Respondent's Exhibit F," and made a part of this record.)

Mr. Pierson: I offer the balance sheets per books of the Union Stock Yards and Transit Company of Chicago for the years ended December 31, 1934; December 31, 1935; December 31, 1936, and December 31, 1937, together with an attached sheet showing the adjustments to the surplus contained in said balance sheets which follows the adjustments which have already been stipulated for the prior years.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: And exception.

(The documents so offered and received in evidence were marked "Respondent's Exhibit G," and made a part of this record.)

Mr. Pierson: I offer in evidence the statement of the net income received and dividends paid by the Stock Yards Harness and Saddlery Company for the taxable years 1934, 1935, 1936, and 1937.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

(The documents so offered and received in evidence, were marked "Respondent's Exhibit H," and made a part of this record.)

Mr. Pierson: I offer in evidence the balance sheets per books of the Stock Yards Harness and Saddlery Company for the years ended December 31, 1934, December 31, 1935, December 31, 1936, December 31, 1937.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

(The documents so offered and received in evidence were marked "Respondent's Exhibit J," and made a part of this record.)

Mr. Pierson: I offer in evidence the balance sheets per books of the Chicago Junction Railway Company for the years ended December 31, 1934, to December 31, 1937, inclusive, together with a statement of the adjustments to surplus which is a separate sheet attached thereto.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

(The documents so offered and received in evidence were marked "Respondent's Exhibit K," and made a part of this record.)

Mr. Pierson: I offer in evidence a statement of the net income received and dividends paid by the Chicago Junction Railroad Company for the years 1934 to 1937, inclusive, together with a sheet thereto attached relative to the adjustments necessary to revise the book net income to restore depreciation charged off on the books in excess of that allowed by the Bureau of Internal Revenue.

Mr. Welch: Objection. It is the same type, Your Honor.

The Member: Well, is it? I am only thinking of the last phrase "in excess of that allowed by the Bureau of Internal Revenue."

Mr. Pierson: Do you desire a statement as to that, Your Honor?

The Member: I don't understand it, in the light particularly of the suggestion that I have heretofore made about the phrase like that importing a lot of law or regulations or conduct—

Mr. Pierson: I think I can clear that up.

I understand there is no objection on the part of counsel to those adjustments that are made other than your general objection to the whole document.

Mr. Welch: I think that is true.

I think I wouldn't want it excluded on that particular ground.

My objection is on the broader ground.

The Member: I am looking beyond your question of admissibility and want to get at this time, when the offer is made, if I can, just what the meaning is with regard to that phrase "in excess of that allowed by the Bureau of Internal Revenue." Otherwise, I have got to guess, when I come to read this record in the privacy of my office in deciding the case, what this means. You might as well tell me now. You know more about it than I do.

Mr. Pierson: May I have the last one on which I made the offer?

(The Clerk hands documents to Mr. Pierson.)

Mr. Pierson: If Your Honor please, on that sheet is stated the net loss per books, and in the next column is a column headed "Excessive Depreciation Charged Off of Books and Disallowed," and in the last column, "Net Loss Revised." That is the net loss as adjusted by the Commissioner of Internal Revenue through the adjustment of depreciation thereon which revises the net loss per books downward to what I understand is agreed between counsel as the correct net loss revised.

Mr. Keelan: No, that is not right.

The Member: They say that is not right.

Mr. Pierson: I might correct that statement to say, Your Honor, that it doesn't say that is agreed to by counsel, it says the net loss revised on this sheet, which shows the reduction is excessive depreciation which is charged off and disallowed by the Commissioner.

The Member: Well, is it agreed that it was correctly disallowed by the Commissioner? Is that question gone? Is it disposed of? That is what I want to know.

Mr. Pierson: I understand that that is the adjustment which the Commissioner made in depreciation in arriving at the tax liability for those years.

The Member: Yes, but isn't that in issue?

Mr. Pierson: No. This is for the years 1934, 1935, 1936, and 1937.

The Member: For the year in question there is an issue like that, isn't there?

Mr. Pierson: I don't think there is, Your Honor; not on the adjustment for depreciation.

The Member: Well, I guess I will have to leave it to you. I am too foggy about it.

Mr. Pierson: I think the matter with respect to the adjustments contained therein, Your Honor, will have been referred to adequately in brief.

The Member: That is what I am afraid of. I can't talk to people when I am reading a brief.

We will receive it.

Mr. Welch: Over my objection and exception?

The Member: Oh, yes.

(The documents so offered and received in evidence were marked "Respondent's Exhibit L," and made a part of this record.)

Mr. Pierson: I offer in evidence the balance sheets per books of the Chicago Junction Railroad Company for the years ended December 31, 1934, to December 31, 1937, together with a sheet attached thereto showing adjustments to the deficit account contained in said balance sheets which carry forward the adjustments already referred to in the agreed stipulation.

Mr. Welch: Object.

The Member: Overruled.

Mr. Welch: Exception, please.

(The documents so offered and received in evidence were marked "Respondent's Exhibit M," and made a part of this record.)

Mr. Pierson: I offer in evidence the statement of net income received and dividends paid by the Produce Terminal Corporation for the taxable years 1934 to 1937, inclusive.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

(The document so offered and received in evidence was marked "Respondent's Exhibit N," and made a part of this record.)

Mr. Pierson: I offer in evidence the balance sheets per

books of the Produce Terminal Corporation for the years ended December 31, 1934, to December 31, 1937, inclusive, with a sheet attached indicating the adjustments made to the surplus account contained in the balance sheets which carry forward the adjustments which have previously been stated in the agreed stipulation of facts.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

(The documents so offered and received in evidence were marked "Respondent's Exhibit O," and made a part of this record.)

Mr. Pierson: I offer in evidence the statement of the net income received and dividends paid of the Central Manufacturing District for the taxable years 1934, 1935, 1936, and 1937.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

(The documents so offered and received in evidence were marked "Respondent's Exhibit P," and made a part of this record.)

Mr. Pierson: I offer in evidence the balance sheets per books of the Central Manufacturing District for the years ended December 31, 1934, to December 31, 1937, inclusive, with a sheet attached showing the adjustment to the surplus contained in said balance sheet which corresponds to certain adjustments made in the agreed stipulation of facts for the earlier years.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

(The documents so offered and received in evidence were

marked "Respondent's Exhibit Q," and made a part of this record.)

Mr. Green: If Your Honor please, do we omit "S" when we get to it in view of the fact that we have used it in the stipulation?

The Member: Yes, we had better omit that.

Mr. Pierson: I offer in evidence the statement of the net income received and dividends paid of the Central Storage and Forwarding Corporation for the taxable years 1934 to 1937, inclusive.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception.

The Clerk: That is Respondent's Exhibit R.

(The document so offered and received in evidence was marked "Respondent's Exhibit R," and made a part of this record.)

Mr. Pierson: I offer in evidence a statement of the balance sheet per books of the Central Storage and Forwarding Corporation for the years ended December 31, 1934, to December 31, 1937, inclusive.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

The Member: I direct the Clerk to mark this as Exhibit T, and state for the record that the reason is to avoid confusion with the stipulation exhibits which are all marked "S" with serial numbers.

The Clerk: This is Respondent's Exhibit T.

(The document so offered and received in evidence was marked "Respondent's Exhibit T," and made a part of this record.)

Mr. Pierson: I offer in evidence a statement of the net income and dividends paid and other data of the Chicago June-

tion Railways and Union Stock Yards Company; namely, the New Jersey Company, for the taxable years 1934 to 1937, inclusive.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception.

The Clerk: Respondent's Exhibit U.

(The document so offered and received in evidence was marked "Respondent's Exhibit U," and made a part of this record.)

Mr. Pierson: I offer in evidence the balance sheets per books of the Chicago Junction Railways and Union Stock Yards Company for the years ended December 31, 1934, to December 31, 1937, inclusive, together with three sheets thereto attached containing adjustments to the surplus account stated in said balance sheets to reflect the adjustments which are carried through and were agreed to in the stipulation of facts for the prior years.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception.

The Clerk: Exhibit V.

(The documents so offered and received in evidence were marked "Respondent's Exhibit V," and made a part of this record.)

Mr. Pierson: I offer in evidence a statement of the net income received and dividends paid per books of the Chicago Stock Yards Company for the taxable years 1934 to 1937, inclusive.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception.

The Member: That is the Petitioner, isn't it?

Mr. Pierson: That is the Petitioner, Your Honor.

The Clerk: Exhibit W.

(The document so offered and received in evidence was marked "Respondent's Exhibit W," and made a part of this record.)

Mr. Pierson: I offer in evidence the balance sheets per books of the Chicago Stock Yards Company designated at the top "Maine Company" for the years ended December 31, 1934, to December 31, 1935, inclusive, together with one sheet thereto attached as showing adjustments to the surplus account contained in the balance sheet.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception.

The Member: Wait a minute.

Mr. Pierson, the Respondent's theory as to the significance of these exhibits for subsequent years is, substantially speaking, all summed up, isn't it, in the significance, whatever it may be, of the four figures on Exhibit W as to the Petitioner Corporation shown in the column headed "Net Income"? Isn't the significance almost entirely focussed in those four figures?

Mr. Pierson: I think that exactly, Your Honor. I believe it also goes back to your sources of income; that is, taking the first column where you have the distribution from New Jersey Company and its subsidiaries. That is a summary of those figures; that is true.

The Member: No, but I mean aren't those four figures there the crucial figures for such significance as the four subsequent years here involved have to the decision of this case?

Mr. Pierson: Well, I don't think so, Your Honor.

The Member: You don't?

Mr. Pierson: No. I think that you have—as long as Petitioner has presented the case on the basis of the background

of all of these companies, that all of them, their activities and everything that they do, the source of income, has a bearing on that phase of it, too.

The Member: Well, I suppose it has a bearing or you wouldn't put it in at all, but doesn't it all become more and more intense as it gets to the point of the net income of this Petitioner top corporation? Isn't that the crux of it all?

Mr. Pierson: Your Honor, I think that leads to the crux of it. That is, we are dealing here with the surplus of the Maine Corporation. That is our Petitioner here before the Board.

The Member: Yes.

Mr. Pierson: And the statement of income for these later years does rely a great deal on the column that is contained in here, but, as I have stated, I think that this background of the other corporations also has its place in considering the general set-up, because it has been testified here that these are run-up incomes from your other companies up to the Maine Company.

The Member: Yes, but it all runs into this 1940—

Mr. Pierson: That is correct, Your Honor.

The Member: —prospect.

Mr. Pierson: That is correct.

The Member: And the thing that has more influence upon the 1940 prospect than anything else is the net income of the Maine Corporation largely to the extent it is derived from the other corporations, but from whatever source it is derived, it is the net income of the Maine Corporation that can be used to achieve the principal purpose as has been said to be in their minds for 1940.

Have I got that straight?

Mr. Pierson: I think there must also be taken into consideration, if Your Honor please, in that regard the financial

condition of the other corporations as well, because it is only the income of those corporations that come over to our Maine Company. That is, they have their assets and balance sheets.

The Member: Yes.

Mr. Pierson: And it is their financial condition as well that we look to to see what the situation is going to be in 1940 as to what they can do about liquidation themselves.

The Member: All right. Your next?

Mr. Pierson: I offer in evidence—

The Clerk: That last exhibit was Exhibit X.

(The document so offered and received in evidence was marked "Respondent's Exhibit X," and made a part of this record.)

Mr. Pierson: I offer in evidence the statement of the net income received and dividends paid by the Pau Corporation for the taxable years 1934 to 1937, inclusive.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

The Clerk: Y.

(The document so offered and received in evidence was marked "Respondent's Exhibit Y," and made a part of this record.)

Mr. Pierson: I offer in evidence the balance sheets per books of the Pau Corporation for the years ended December 31, 1934, to December 31, 1937, inclusive.

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

The Clerk: Z.

(The document so offered and received in evidence was marked "Respondent's Exhibit Z," and made a part of this record.)

Mr. Pierson: I offer in evidence a schedule of the securi

ties owed by F. H. Prince and F. H. Prince & Company to Maine Company from December 31, 1934, through December 31, 1936.

If Your Honor please, I have also a schedule sheet which I will offer as one with regard to the cash indebtedness due from corporations with a summary of taxes, if that is satisfactory.

Mr. Welch: This is another matter. This is not earnings?

Mr. Pierson: No, that is correct. I am making the offer on that at the present time.

Mr. Welch: You are offering now a schedule of securities due from F. H. Prince & Company or F. H. Prince to the Maine Company and the cash due for those years?

Mr. Pierson: Yes, as two separate sheets.

Mr. Welch: This is another matter and I object to it on a different ground. Now we have the earnings and balance sheets and things of that sort, and Your Honor overruled me, and we got to the financial history of the company. This schedule of changes in the securities situation and in the loan situation I object to, since it cannot have any bearing upon the income or profits of the Maine Company.

Mr. Pierson: If Your Honor please, in that regard, Respondent takes the position that it does have a bearing upon the financial set-up of the Maine Company; that is, these sheets represent these securities which have been borrowed or loaned by the Maine Company to F. H. Prince and F. H. Prince & Company in these years together with the amount of cash—

The Member: Well, I wish you would be a little more specific and tell me what the true significance is. It really doesn't help me very much when you say that may have a bearing. That doesn't mean very much. What bearing, to use your own words, do they have? What I would like to know is, when you have a question of this sort as to whether

the evidence of subsequent events is or is not admissible upon the issues in this case, it can only be admissible if it has any significance, which leads to the determination of the issue in the way that you think the determination should be made. Otherwise, you wouldn't offer it. Now, I am asking you only what the Respondent thinks is the significance of this, and if I can see that it has in the mind of what I think is a reasonable man some significance leading towards that conclusion, I would be disposed to let it in, but I can't let it in blindly until I know that it does have that significance.

Mr. Pierson: If Your Honor please, that goes back to the same statement that I heretofore made about the financial condition of the respective companies looking toward 1940 to which testimony has been here introduced.

The Member: Yes. This isn't one of those companies?

Mr. Pierson: No.

The Member: This is an individual and some sort of a nameless—not nameless, but some sort of a descriptionless organization which isn't a corporation, and it isn't anything, so far as I have been able to discover, and there has been some kind of borrowing going on after the close of the last taxable year that is in issue here. Now, what—

Mr. Pierson: That borrowing, if Your Honor please, by the contents contained in these documents, show the activities of our Petitioner, the Maine Company, in loaning money to the stockholder during these years '34, '35, '36, and '37. That activity follows through from the testimony and the evidence which has gone in heretofore showing that the individual was borrowing money throughout those years. Now, as he borrows the money, and as his F. H. Prince & Company, which the record shows he is in control of or practically owns—as he borrows that money he takes out of the corporation, and there again it will leave the Maine Company in a position as we come down to 1940 with money being

given over to the individual during all of these years both to cash and securities.

The Member: And this is a projection of a course of conduct that was in existence as well during the taxable years; is that true?

Mr. Pierson: That is correct, Your Honor. That is correct, Your Honor.

The Member: You renew your objection?

Mr. Welch: I would like to say one more word. The preceding exhibits that have been offered and accepted over my objection, I take it, are offered purely on the point of unreasonable accumulations. That is to say, I take it that the theory is that the Government wishes to show that in some way because of accumulations after the taxable year in question, we must unreasonably have accumulated in prior years, or heaven knows when, but, anyway, it has to do with earnings and accumulations, I take it.

This evidence here offered is on quite a different footing and has to do, I take it, with something that we all know we are trying, and that is the question of intention. Did Mr. Prince intend to take the money down from the corporation in the guise of a loan when it should have been a dividend? And, as I said at an earlier time in this case, there have been cases tried in which the intention was found to exist in one year and not to have existed in others. Any evidence, and the evidence is slight in what is offered here, that the intention existed in the later years, would not prove nor would it, I think, even be evidence of the existence of the intention in the earlier years, and for that reason I object to this offer on a somewhat different basis and somewhat more stronger than I did to the others, the earlier exhibits that were admitted over my objection.

May I inquire if this is the last of the series of what I might call post-war offers?

Mr. Pierson: With the exception, Mr. Welch, of the interest paid, which, I take it, you will want if the original exhibit is received.

The Member: I overrule the objection only because I can see that there is a conceivable possibility that the subsequent events may indicate the existence of a course of conduct which in itself may demonstrate to some extent an intention during the taxable years.

Mr. Welch: Are you going to offer the interest paid, too?

Mr. Pierson: Yes, I will offer that as the next exhibit.

I offer the exhibit consisting of three sheets, the document consisting of three sheets at the present time.

The Member: That is received.

Mr. Welch: Objection and exception if I may, sir?

The Member: Yes.

The Clerk: Respondent's Exhibit AA.

(The document so offered and received in evidence was marked "Respondent's Exhibit AA," and made a part of this record.)

Mr. Pierson: I offer at this time a schedule of the interest paid by F. H. Prince and F. H. Prince & Company to the Maine Company for the years 1934, 1935, 1936, and 1937. I take it that Mr. Welch desires that inasmuch as the other has been received in evidence.

Mr. Welch: I appreciate your offering it.

The Member: You object on a similar ground?

Mr. Welch: I don't know what to do. I guess I won't object to this because if the others are in, I want this in. Without waiving my objection to prior exhibits on the possible ground of any inconsistency in position, I do not object to this.

The Clerk: That is Respondent's Exhibit BB.

(The document so offered and received in evidence was

marked "Respondent's Exhibit BB," and made a part of this record.)

Mr. Pierson: If Your Honor please, I understand Counsel for Petitioner has no objection to the document I am now offering in so far as it is a statement of what is contained herein, and I will state what it is.

I offer at this time a transcript of the journal entries relating to sale of certificates of beneficial interest in the Central Manufacturing District as of May 26, 1936.

Mr. Welch: That is objected to.

The Member: Is that from the journal of the Central Manufacturing District?

Mr. Pierson: That is from the journal of the Chicago Junction Railways and Union Stock Yards Company.

The Member: You say you have an objection, Mr. Welch?

Mr. Welch: Well, my objection is on the same ground.

The Member: The objection is overruled.

Mr. Welch: And my exception noted?

The Clerk: Respondent's Exhibit CC.

(The document so offered and received in evidence was marked "Respondent's Exhibit CC," and made a part of this record.)

Mr. Welch: Have you finished this line?

Mr. Pierson: Yes, I have.

Mr. Welch: I would like to say one other word, although I doubt if it may elicit anything from Your Honor. In the Grocery case, the Board Member said to counsel indicating that it was his view that the subsequent proof as to what happened in the subsequent years was of little or no weight. I suppose I have no right to call for Your Honor's views, but I must, myself, consider whether I shall now start a new lawsuit about the subsequent years and be prepared to put witnesses on in rebuttal if I deem it advisable or not. I am unhappy in the case in that we don't know, well, what the is-

sues are as to the years we are trying, and now evidence has gone in as to later years which I believe to be inadmissible and of little or no weight, and I think Your Honor appreciates the difficulty of my position, scarcely knowing whether I should offer some evidence or follow my instinct, which is that it is at most of trivial importance, and that the case in the end must be tried on the evidence relating to the years in question.

The Member: I have no hesitation in expressing my view for the little weight it has, but I think is negligible. The expression of my brother Smith in, I believe it was, the National Grocery Company case became of no consequence at all after the Supreme Court had and decided the case, and in the light of the Supreme Court's opinion I don't think it makes a particle of difference what Mr. Smith's view of the weight, probative force of the evidence as to the subsequent occurrences. I think it has but slight weight, but anything that I may think about that now is of little consequence in view of the wholly unknown scope of the law on this subject. There has been but one case on the subject, and that was decided by the Supreme Court and the cases have been so scarce that I think no one can draw a line of progress of the law under the case except to prick it out, as Mr. Justice Holmes said.

I doubt very much whether the subsequent events have any significance unless they are to be tied up very clearly by a course of conduct to the intentor what the statute calls the purpose during the taxable years in question. Now, it is possible that it can be tied up, and I am supposing that it is probable that the Respondent will tie it up, and if he can tie it up, I think it would be error on my part to exclude it. If he does tie it up, it is the Petitioner's risk as to whether it is or is not necessary to put in evidence that will overcome whatever force the Respondent's evidence may have. I see

nothing that I may say will lessen that risk. You have got to take it, and it is imposed upon you by something that it is not within my control at all.

Mr. Welch: Thank you, sir.

The Member: I may say that I appreciate very keenly the difficulty the Petitioner is in by reason of the uncertainty as to the Respondent's petition, because I, myself, am in an equally baffling uncertainty.

Mr. Pierson: If Your Honor please, I think we will attempt to clear that up after some of our evidence is in, because it is our purpose to put these returns in evidence upon which reference will be made.

The Member: I can't deplore too strongly the fact that I have been sitting here for four days listening to the Petitioner's evidence in a case which arose through a determination of the Respondent as to which I am yet without a clear and specific statement as to the grounds for the determination. I leave aside what seems to me to be the unfairness to a petitioner to be asked to come in and litigate a case in which he is required to prove almost entirely negative possibilities and deal only with my own idea in attempting to tie up that evidence with a hypothetical theory which I have got to grope for in order to find in any form. I have been groping for four days, and I am completely exhausted by trying to find out which one of a dozen possible theories is the one to which to tie the evidence in question in order to give it any significance. I think it is an unfair proceeding from the standpoint of the Board, if no one else.

Mr. Pierson: I think we will attempt to enlighten Your Honor upon that so that we will get to the basic factor of it.

If Your Honor please, Counsel for Petitioner does not object, I take it, to the introduction of the income tax returns of the Petitioner Corporation beginning with the years 1911

through the years 1929, the years 1930, '32, and '33 having already been introduced in evidence by Petitioner.

Is that correct, Mr. Welch?

Mr. Welch: Well, I just am without interest. This is what we might call the pre-war period now. If the Government wants to go into that, I just don't care. Again it irritates me because it clutters my mind in the record, but it is all right, if you wish to do it.

The Member: You say the income tax returns. You mean the excise tax returns?

Mr. Pierson: It will be income tax returns and income and excess profits tax returns as they apply to the respective years.

The Member: No, but I mean 1911 and 1912 before the income tax.

Mr. Pierson: Yes. I might say that our first year is 1912, and it is the return of annual net income of miscellaneous corporations, so captioned, and filed by the Chicago Stock Yards Company, our petitioner in this case.

I offer such return for the year ended December 31, 1912.

The Clerk: That is Respondent's Exhibit DD.

(The document so offered and received in evidence was marked "Respondent's Exhibit DD," and made a part of this record.)

Mr. Green: Are we going to get copies of these?

Mr. Pierson: I offer in evidence—

The Member: Mr. Green asks if he is going to get copies of them. Is there any objection on the part of the Petitioner to turning these over to the Respondent's Counsel over the week end? No. I mean the opposite. Is there any objection on the part of the Respondent?

Mr. Welch: I think I would object because I don't want Mr. Green to have to look them over over the week end.

The Member: I thought that is what you asked for before.

You asked me about some exhibits before you asked if there were copies of them, and Mr. King said—I mean after that Mr. Pierson said he would make copies. Then Mr. King indicated that it was impossible to make those for you to have over the week end. I thought you meant all of these things.

Mr. Welch: Not these by any means.

Mr. Green: My only question was that we are missing some of the old copies, and I would like to have them.

The Member: Are you going to have them photostated?

Mr. Pierson: If Your Honor please, we will cooperate, with counsel if we are given permission to withdraw them and have them photostated. We will have that done.

The Member: Very well.

Mr. Pierson: I offer in evidence the return of annual net income of the Chicago Stock Yards Company for the year ended December 31, 1913.

The Clerk: That is Respondent's Exhibit EE.

(The document so offered and received in evidence was marked "Respondent's Exhibit EE," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of annual net income of the Chicago Stock Yards Company for the year ended December 31, 1914.

Mr. Welch: May I interrupt to ask whether or not there is any interest in the returns being offered other than the figures contained therein?

Mr. Pierson: Well, in reply to that, Mr. Welch, I will say that it is offered for the purpose of showing the figures contained therein and the other data with regard to the position of the respective officers of the corporation to which testimony has been adduced here before the Board.

Mr. Welch: What caught my eye as we turned them over was this: I observed the phrase "Chicago Stock Yards Company and its businesses" or after that the words "acquiring

guaranteeing, and dealing in securities." I don't know whether some subtle poison is being put in on the ground or suggesting that we are a holding company, a mere holding company by virtue of these returns, and, if so, I wish to point out that I object to the returns being offered for that purpose. That is to say, the fact that we may have been a mere holding company so many years ago would, I take it, be no evidence that we were a mere holding company now, nor do I at all understand that there is any suggesting that we were ever a mere holding company. If Mr. Pierson has in mind arguing anything of this sort, I should like to know it. If he is trying to show the financial history of the company from the tax returns, that seems to be another dull matter.

Mr. Pierson: If Your Honor please, I make the offer for the purpose of showing the information contained in these returns which sets forth not only its financial condition and its income statement, but with respect to all of the other facts which are contained therein which are under oath by the officers of the corporation.

The Member: Well, there isn't any doubt but that you may do that, but there also isn't any doubt that you ought, in fairness, to let your adversary know what it is you are relying on in a document that is as voluminous as any tax return is, and since he has made a specific inquiry as to one item I think that ought, fairly, to be answered because he may have to get a lot of evidence to overcome it, if you are relying upon it and he wouldn't undertake to get any evidence to overcome something you weren't relying upon, and if you just say, "I am offering this for everything that is in it," it is hardly just fair.

Mr. Pierson: If you will just pardon me a moment, Your Honor.

(Counsel for the Respondent confer.)

Mr. Pierson: If Your Honor please, so far as argument on

that particular statement contained in the statement is concerned, Respondent does not intend to rely on the statement, especially back of those years. With the other returns which are already in evidence, they will speak for themselves.

However, the Respondent does offer it for the purpose of showing the facts and figures contained herein with regard to the surplus, income, and all of the financial structure of the corporation.

Mr. Welch: That is very fair of you and I thank you for that.

(The document so offered and received in evidence was marked "Respondent's Exhibit FF," and made a part of this record.)

Mr. Pierson: I offer the income tax return of annual net income of the Chicago Stock Yards Company for the year ended December 31, 1915.

Mr. Welch: I trust Your Honor will count it no discourtesy if I left the room momentarily and have Mr. Green follow this?

Mr. Pierson: If Your Honor please, might we have a recess for a few moments?

The Member: Yes, we will take a recess.

(There was a short recess taken.)

(The document so offered and received in evidence was marked "Respondent's Exhibit GG," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of annual net income of the Chicago Stock Yards Company for the year ended December 31, 1916.

(The document so offered and received in evidence was marked "Respondent's Exhibit HH," and made a part of this record.)

The Member: Now you are just going right through, aren't you, with each year?

Mr. Pierson: That is correct.

The Member: You don't have to describe them every time. Just say the return for the year so and so and so and so and we will get through more quickly.

Mr. Pierson: There are schedules attached to some of these returns in the later years, and excess profits returns.

The Member: You are always including the schedules, aren't you?

Mr. Pierson: Yes.

The Member: Where there is an excess profits return attached to the schedule return, you may say so.

Mr. Pierson: I offer the 1917 income tax return in evidence, and also the corporation excess profits tax return. They are attached together, Your Honor.

The Member: What letter is that?

The Clerk: H.

(The document so offered and received in evidence was marked "Respondent's Exhibit H," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income and profits tax return for the year 1918.

(The document so offered and received in evidence was marked "Respondent's Exhibit JJ," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income and profits tax return for the calendar year 1919.

(The document so offered and received in evidence was marked "Respondent's Exhibit KK," and made a part of this record.)

Mr. Pierson: I offer in evidence tax return for the calendar year 1920.

(The document so offered and received in evidence was

marked "Respondent's Exhibit LL," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax and profits tax return for the calendar year 1921.

(The document so offered and received in evidence was marked "Respondent's Exhibit MM," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return for the calendar year 1922.

(The document so offered and received in evidence was marked "Respondent's Exhibit NN," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return for the calendar year 1923.

(The document so offered and received in evidence was marked "Respondent's Exhibit OO," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return for the calendar year 1924.

(The document so offered and received in evidence was marked "Respondent's Exhibit PP," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return for the calendar year 1925.

(The document so offered and received in evidence was marked "Respondent's Exhibit QQ," and made a part of this record.)

Mr. Pierson: I offer in evidence the tentative and completed tax return for the calendar year 1926.

(The document so offered and received in evidence was marked "Respondent's Exhibit RR," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return for the calendar year 1927.

The Member: Leave out "SS."

(The document so offered and received in evidence was marked "Respondent's Exhibit TT," and made a part of this record.)

Mr. Pierson: I offer in evidence the tax return for the calendar year 1928.

(The document so offered and received in evidence was marked "Respondent's Exhibit UU," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return for the calendar year 1929.

(The document so offered and received in evidence was marked "Respondent's Exhibit VV," and made a part of this record.)

Mr. Pierson: If Your Honor please, in that connection, while I haven't stated the schedule thereto attached to the respective returns, may I have it understood they are in evidence with the returns?

I offer in evidence the individual tax return of Frederick Henry Prince trust for the calendar year 1932.

(The document so offered and received in evidence was marked "Respondent's Exhibit WW," and made a part of this record.)

Mr. Pierson: I offer in evidence the fiduciary return of income of the Frederick Henry Prince trust for the calendar year 1932.

(The document so offered and received in evidence was marked "Respondent's Exhibit XX," and made a part of this record.)

Mr. Pierson: I offer in evidence the individual tax return of Frederick Henry Prince trust for the calendar year 1933.

(The document so offered and received in evidence was marked "Respondent's Exhibit YY," and made a part of this record.)

Mr. Pierson: I offer in evidence a copy of the fiduciary return of income of Frederick Henry Prince trust for the year 1933.

I might state, Your Honor, that that copy was furnished by Counsel for the Petitioner.

(The document so offered and received in evidence was marked "Respondent's Exhibit ZZ," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income tax return of F. H. Prince & Company, Inc., for the calendar year 1932.

(The document so offered and received in evidence was marked "Respondent's Exhibit AAA," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income and excess profits tax return of F. H. Prince & Company, Inc., for the calendar year 1933.

(The document so offered and received in evidence was marked "Respondent's Exhibit BBB," and made a part of this record.)

Mr. Pierson: I offer in evidence the individual income tax return of Frederick Henry Prince for the calendar year 1917.

(The document so offered and received in evidence was marked "Respondent's Exhibit CCC," and made a part of this record.)

Mr. Pierson: I offer in evidence the individual tax return of Frederick Henry Prince for the calendar year 1918.

(The document so offered and received in evidence was marked "Respondent's Exhibit DDD," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick Henry Prince for the year ended December 31, 1919.

(The document so offered and received in evidence was marked "Respondent's Exhibit EEE," and made a part of this record.)

Mr. Pierson: I offer in evidence a copy of the income tax return of Frederick Henry Prince for the year ended December 30, 1920.

(The document so offered and received in evidence was marked "Respondent's Exhibit FFF," and made a part of this record.)

Mr. Pierson: I offer in evidence a copy of the income tax return of Frederick H. Prince for the year '21.

(The document so offered and received in evidence was marked "Respondent's Exhibit GGG," and made a part of this record.)

Mr. Pierson: I offer in evidence a copy of the income tax return of Frederick H. Prince for the calender year '22.

(The document so offered and received in evidence was marked "Respondent's Exhibit HHH," and made a part of this record.)

Mr. Pierson: A copy of the income tax return of Frederick H. Prince for the calendar year 1923.

(The document so offered and received in evidence was marked "Respondent's Exhibit III," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick H. Prince for the calendar year 1924.

(The document so offered and received in evidence was marked "Respondent's Exhibit JJJ," and made a part of this record.)

Mr. Pierson: I offer in evidence a copy of the income tax return of Frederick Henry Prince for the calendar year 1925.

(The document so offered and received in evidence was

marked "Respondent's Exhibit KKK," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick Henry Prince for the calendar year 1926.

(The document so offered and received in evidence was marked "Respondent's Exhibit LLL," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick Henry Prince for the calendar year 1927.

(The document so offered and received in evidence was marked "Respondent's Exhibit MMM," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick Henry Prince for the calendar year 1928.

(The document so offered and received in evidence was marked "Respondent's Exhibit NNN," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick Henry Prince for the calendar year 1929.

(The document so offered and received in evidence was marked "Respondent's Exhibit OOO," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick Henry Prince for the calendar year 1930.

(The document so offered and received in evidence was marked "Respondent's Exhibit PPP," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick Henry Prince for the calendar year 1931.

(The document so offered and received in evidence was marked "Respondent's Exhibit QQQ," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick Henry Prince for the year 1932.

(The document so offered and received in evidence was marked "Respondent's Exhibit RRR," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of Frederick Henry Prince for the calendar year 1933.

(The document so offered and received in evidence was marked "Respondent's Exhibit TTT," and made a part of this record.)

Mr. Pierson: If Your Honor please, may I have the same understanding with respect to the returns of Mr. Frederick Henry Prince that that includes, also, the schedules thereto attached?

I offer in evidence the corporation income and profits tax return of Central Manufacturing District Company for the calendar year 1921.

Mr. Welch: Off the record?

The Member: Off the record.

(There was a discussion off the record.)

The Member: On the record.

Mr. Welch: Among other things, if Your Honor please, it is conceivable somebody might have to print this record some day. It is within your jurisdiction, I should think in regard to material the relevancy of which I cannot possibly see, should be excluded.

I think I ought to object to this series of returns.

The Member: You mean of the Central Manufacturing District only because it encumbers the record?

Mr. Welch: Well, in part. This is the Central Manufacturing District Company, I understand.

The Member: Is there any significance in the "Company" you are talking about?

Mr. Welch: It is something we haven't dealt with at all here, so far.

The Member: You mean that is a different organization?

Mr. Welch: It is.

Mr. Pierson: I would like to state that in that connection in the stipulation of facts the Central Manufacturing District Company, as I recall, is referred to in there. It is one of the companies as well, and not referred to on our chart as the family group, but is one of the companies which was in existence in and under the New Jersey Company and in which Mr. Prince was interested.

The Member: Well, that is not quite enough to make it significant. What is the reference to it? This, as I understand it, is not C. M. D.

Mr. Pierson: That is correct, Your Honor. This is C. M. D. Company.

The Member: Let me see what the significance is.

Mr. Pierson: Yes, if Your Honor will excuse me a moment. I will see if I can find that in the stipulation itself.

(Counsel for the Respondent confer.)

Mr. Pierson: If Your Honor please, I will withdraw the offer with respect to that company.

The Member: Very well.

Mr. Pierson: I offer in evidence the corporation income tax return of Produce Terminal Corporation for the period March 1 to December 31, 1926, that being the first year out of the affiliation.

The Member: First year what?

Mr. Pierson: When it filed a separate corporate return, not in the affiliated group.

The Member: Oh, yes.

Mr. Pierson: I offer that at this time.

(The document so offered and received in evidence was marked "Respondent's Exhibit UUU," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income

tax return of Produce Terminal Corporation for the calendar year 1927.

(The document so offered and received in evidence was marked "Respondent's Exhibit VVV," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income tax return of Produce Terminal Corporation for the calendar year 1928.

(The document so offered and received in evidence was marked "Respondent's Exhibit WWW," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income tax return of the Produce Terminal Corporation for the calendar year 1929.

(The document so offered and received in evidence was marked "Respondent's Exhibit XXX," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income tax return of Produce Terminal Corporation for the calendar year 1930.

(The document so offered and received in evidence was marked "Respondent's Exhibit YYY," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income tax return of the Produce Terminal Corporation for the calendar year 1931.

(The document so offered and received in evidence was marked "Respondent's Exhibit ZZZ," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income tax return of the Produce Terminal Corporation for the calendar year 1932.

(The document so offered and received in evidence was

marked "Respondent's Exhibit AAAA," and made a part of this record.)

Mr. Pierson: I offer in evidence a photostatic copy of the corporation income and excess profits tax return of the Produce Terminal Corporation for the calendar year 1933.

I might state to Your Honor that we have had that photostated, it being in audit in the Bureau at the present time, and may I have the understanding, Your Honor, with respect to the returns of the Produce Terminal Corporation that that, likewise, includes the schedules thereto attached?

For the purpose of the record, Your Honor, that consists of 13 photostatic sheets.

(The document so offered and received in evidence was marked "Respondent's Exhibit BBBB," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income tax return of Pau Corporation for the calendar year 1932.

(The document so offered and received in evidence was marked "Respondent's Exhibit CCCC," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation income and excess profits tax return of Pau Corporation for the calendar year 1933.

(The document so offered and received in evidence was marked "Respondent's Exhibit DDDD," and made a part of this record.)

(A large number of documents were handed to Mr. Pierson by Mr. King.)

The Member: Oh, come now; we are not just a receptacle for the physical reception of whatever somebody thinks ought to be in this record. It ought to have some significance.

Mr. Pierson: If Your Honor please, in the stipulation as it has been drawn the parties have agreed as regards

to certain book incomes of the New Jersey Company and it is Respondent's purpose to put these income tax returns in to show the analysis as between the book income and the income per return and while we attempted to construct such a statement for the purpose of the record here, I understand my opponents didn't desire that that be done.

In order that we may do that, we feel that we should have these tax returns here in order that such an analysis may be made.

Mr. Welch: At the highest, certainly, we could offer just certain batches of that ghastly collection of documents before you, sir.

The Member: I don't see, technically, any way of avoiding it.

If the Government insists that these are a part of its case, there is no way of avoiding it.

Mr. Pierson: I might state, Your Honor, we are beginning here with the year 1917 instead of going back to the earlier years.

Mr. Welch: That seems long ago enough. Can't you move forward a little, Mr. Pierson?

Mr. Pierson: I might be able to cut the record down somewhat.

Just a moment, if Your Honor please? (Counsel for the Respondent confer.)

Mr. Pierson: Your Honor, my associate advises me that we might start with the year 1925 instead of 1917 in order to reduce the record.

I offer in evidence—and if Your Honor will permit me, I will refer to this as the New Jersey Company return, if I may—I offer in evidence the tentative and completed income tax return of the New Jersey Company for the calendar year 1925.

(The document so offered and received in evidence was

marked "Respondent's Exhibit EEEE," and made a part of this record.)

Mr. Pierson: I offer in evidence the tentative and completed return of the New Jersey Company for the calendar year 1926.

(The document so offered and received in evidence was marked "Respondent's Exhibit FFFF," and made a part of this record.)

Mr. Pierson: I offer in evidence the corporation tentative and completed income tax return for the New Jersey Company for the calendar year 1927.

(The document so offered and received in evidence was marked "Respondent's Exhibit GGGG," and made a part of this record.)

Mr. Pierson: I offer in evidence the tentative and completed corporation income tax return for the New Jersey Company for the calendar year 1928.

(The document so offered and received in evidence was marked "Respondent's Exhibit HHHH," and made a part of this record.)

Mr. Pierson: I offer in evidence the tentative and completed income tax return of the New Jersey Company for the calendar year 1929.

(The document so offered and received in evidence was marked "Respondent's Exhibit IIII," and made a part of this record.)

Mr. Pierson: I offer in evidence the tentative and completed income tax return of the New Jersey Company for the calendar year 1930.

(The document so offered and received in evidence was marked "Respondent's Exhibit JJJJ," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of the New Jersey Company for the calendar year 1931.

(The document so offered and received in evidence was marked "Respondent's Exhibit KKKK," and made a part of this record.)

Mr. Pierson: I offer in evidence the income tax return of the New Jersey Company for the calendar year 1932.

(The document so offered and received in evidence was marked "Respondent's Exhibit LLLL," and made a part of this record.)

Mr. Pierson: I offer in evidence the tentative and completed corporation income and excess profits tax return of the New Jersey Company for the calendar year 1933.

(The document so offered and received in evidence was marked "Respondent's Exhibit MMMM," and made a part of this record.)

Mr. Pierson: May I have the same understanding, Your Honor, that the returns as referred to of the New Jersey Company includes the schedules thereto attached?

I might further state for the record that that is a consolidated income tax return for those years and with the understanding that I may have, Your Honor, with regard to the computation upon which was offered and which I withdrew, with regard to the computation of taxes, am I still correct in my understanding that we may offer that again before the case is closed?

The Member: I don't know.

Mr. Pierson: By that I mean the difference in the tax computation, in the event—

The Member: I know, but it is asking me to recapture too much, to answer that.

Mr. Pierson: I think that is in the record, already, Your Honor.

The Member: I can't go back and recapture what was said. I can't rule intelligently or answer your question, now.

Mr. Pierson: I am satisfied it was clear at the time. It was an excess caution on my part.

Now, if Your Honor please, I further understand we may withdraw these returns and substitute photostats and have photostats made for counsel for the other side.

The Member: Yes, and in view of the fact that one of these things that you put in evidence was a miniature photostat I want you to have full-sized photostats of all the others.

Mr. Pierson: All right, sir.

The Member: Because those miniature photostats are too hard to read and deal with. The others are just as easy to make and even they are difficult to see clearly.

You may withdraw these and make full sized photostatic copies.

As I understand, you are going to make a copy for your adversary.

Mr. Pierson: I think we can get to an understanding as to the ones which my opponent needs and we will have those photostated for him.

The Member: All right.

Now what? The Respondent still has the ball.

Mr. Pierson: In that connection, as Mr. Clark heretofore stated, we are in the position of having our witness—

The Member: I understand about that. You don't need to repeat that.

Are these all the exhibits and are you now ready, on Monday morning, to start right in with your witness?

Mr. Pierson: I understand Mr. Green has a correction or two on one of these exhibits, or two exhibits, from 1934 to 1937; is that correct?

Mr. Green: Mr. King and I have agreed to take care of that and that will be made outside the courtroom so that we will not have to bother the Court.

Mr. Pierson: Aside from that we will be ready to start Monday morning with our further testimony in this case.

The Member: We will suspend now until 10 o'clock Monday morning.

(Whereupon, at 4:20 o'clock p. m., February 3, 1939, the hearing in the above-entitled matter was adjourned.)

VOLUME II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 488

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHICAGO STOCK YARDS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 28, 1942
CERTIORARI GRANTED DECEMBER 7, 1942

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3730.

CHICAGO STOCK YARDS COMPANY,

PETITIONER FOR REVIEW,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS.
DECISION, MARCH 29, 1941.

RECORD ON PETITION FOR REVIEW.

VOLUME II.
Pages 575 to 900, inclusive.

JOSEPH N. WELCH,
HALE & DORR,
for Petitioner.

SAMUEL O. CLARK, JR.,
ASSISTANT ATTORNEY GENERAL,

J. LOUIS MONARCH,
SPECIAL ASSISTANT TO THE ATTORNEY GENERAL,
for Commissioner of Internal Revenue.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1942.

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[Title omitted.]

SIXTH DAY.

REPORTER'S MINUTES.

[Filed February 9, 1939.]

Hearing at Washington, D. C., on the 6th day of February, 1939, at 10 o'clock a. m.

The hearing in the above-entitled proceeding was resumed on this the 6th day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

Mr. Clark: Mr. Merriman, will you take the stand, please?

MR. NORMAN MERRIMAN

called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Clark). What is your full name? *A.* Norman Merriman.

Q. 2. Where do you live? *A.* Englewood, N. J.

Q. 3. Where were you educated? *A.* Lehigh University, graduating in the year 1905 with a degree of Bachelor of Arts, and took one year post graduate work at the University of Michigan.

Q. 4. Now, after taking that course at Michigan, what have you done, tracing down through the years? *A.* In 1907 to early 1908, I was associate editor of a monthly

magazine called the Engineering Digest, and in the year 1908 I left that magazine and became associated with the firm of A. W. McLaughlin & Company, in New York City, who were brokers and dealers in real estate mortgages.

In 1909 I became associated with the investment brokerage house of Shelden & Shelden, which later became the firm of Shelden, Morgan & Company, first as a customers' man and then later as manager of the investment department of that organization. In that capacity, I had general charge of investigation of securities that were inquired about by the members of the firm or by the customers of the firm, and I passed on the bulk of the firm's participation in syndicates.

In 1916 I went with the investment department of White & Company of New York, an investment banking house, and with that firm my work was being in general charge of the distribution of security issues originated by that firm as well as acting in an advisory capacity with respect to the security issues which they originated.

In 1917 and 1918 I became manager of the bond department of Brightung & Company of New York City, and there I had charge of the distribution of securities as well as acting in an advisory capacity with respect to the securities which they issued.

For the next two years I was manager of the bond department of Bolster & Company of New York, in which capacity I had charge of the sales organization which distributed securities, and I did all of the buying of securities for the firm's own account, having the discretionary power to buy open market securities and new security issues in sums ranging up to $100,000 to $250,000.

Mr. Welch: I did not get that.

The Member: Read that, Mr. Reporter.

(The record was read.)

The Witness: And in 1921 I opened my own office to un-

dertake the financing of the largest size industrial companies, and continued in that business, operating at the same time in both securities and real estate in my own account until 1927, when I was offered a position to organize the statistical and research departments of the New York Stock Exchange firm of Samuel Ungerleider & Company, which had offices in New York and five or six cities outside. In that capacity I investigated virtually all of the securities which that firm contemplated underwriting. I conducted the research that was necessary for the giving of advice to clients as to buying and selling securities.

In 1929 that firm organized an investment trust called the Ungerleider Financial Corporation, and I became secretary of that corporation, which started out with an initial capacity of approximately twenty million dollars.

I was a member of that corporation's investment committee, and in that capacity I had general charge of its open market transactions in securities, and had at times discretionary power to buy or sell securities owned by the corporation, in sums of a million dollars or thereabouts.

In late 1930 or early 1931 that corporation passed under the control of the Atlas Corporation, a very large investment trust which had acquired the largest single block of stock outstanding and had acquired substantial other blocks in the open market, and it assumed control, and I resigned as secretary of the corporation some time in 1931, continuing as I have all during this time with Samuel Ungerleider & Company in my capacity in charge of their statistical and research departments.

In December, 1931, the firm Samuel Ungerleider & Company merged with the firm of Fenner & Beane, becoming the firm of Fenner, Beane & Ungerleider, and I became affiliated with that house, which was then one of the two or three largest commission brokerage houses probably in

the world, certainly in the United States. My work with that firm was largely advisory in character, relating to the investment policies of certain firm members and certain important clients of the firm.

In 1934, in March of '34, I resigned to open up my own office as investment counsel and consulting economist, and have maintained my offices at 67 Broad Street from that time down to the present.

Q. 5. You are speaking of New York City? *A.* Yes, sir.

Q. 6. Have you done any writing along the lines which would apply to your experience and training? *A.* Yes, sir; I have written a great many articles for financial publications of all types and for newspapers, beginning in 1914 or '15 with a long series of articles I contributed to the Magazine of Wall Street, some of them dealing with valuations and principles of valuation, particularly certain articles which pertained to the valuation of special war profits that were being obtained in 1916 and '17 by a great many American industrial companies, and I have written articles for the Bankers Magazine, Forbes Magazine, Money, Markets, and Investments, and numerous other publications in the financial field.

Q. 7. Have you lectured on financial topics? *A.* I have been invited to lecture on financial topics by the American Statistical Association, by Columbia University, Princeton University, College of the City of New York, and by various civic organizations in and around New York City.

The Member: Have you accepted the invitations?

The Witness: Yes, sir.

Q. 8. (By Mr. Clark). Have you at any time been employed as a valuation expert? *A.* Yes, sir. During the past 10 years I have been employed as valuation expert on a considerable number of occasions, and have appeared as a witness on valuation matters before the United States.

Board of Tax Appeals, before federal courts in several different circuits, and before certain State courts. I have—

The Member: Well, you have appeared as a witness in proceedings before this particular division of the Board of Tax Appeals, haven't you?

The Witness: Yes, sir. I appeared before Your Honor about a year ago.

The Member: You have appeared several time before me, have you not?

The Witness: I think I have appeared two or three times before you. The last case that I remember was the one involving the value of the Emerald Coal Company stock in which I appeared as a witness.

The Member: The Pittsburgh case?

The Witness: Yes, sir.

The Member: I only wanted that to show that the witness is not new to me in his performance; that you will both be aware of the fact that I have seen him before.

Q. 9. (By Mr. Clark). Had you finished with your answer? A. Those valuation studies that I have made in connection with court testimony or matters involved in litigation have involved a very wide variety of companies including banking, public utilities, miscellaneous types of industrial business, and for the past eight months I have been retained by the New York Central Railroad, by the Lehigh Valley, Delaware, Lackawanna & Western, the Erie Railroad, the Central Railroad of New Jersey, and the New Jersey and New York railroads to value their properties in the State of New Jersey, which operation has necessitated the valuation of the systems themselves, the railroad systems, themselves, in order to allocate a portion of the value to the State of New Jersey.

Q. 10. Have you done any work as a compiler? A. Well, I was the original—originator of a weekly business index,

which I believe was the first weekly business index compiled in the United States, on which I began work in 1929, while I was in the Ungerleider financial organization, and that index was published for a number of years by the Daily Investment News, in New York City, and it is still compiled by me.

Q. 11. State a few of the major valuation cases in which you have been employed by the Department of the Treasury or the Department of Justice.

The Member: May I ask, in connection with the last answer given, does your index have a title? — Is it known by any name?

The Witness: It is known as the Merriman Business Index.

The Member: Now, if you will answer the question Mr. Clark has put to you.

The Witness: What was the question again?

(The last question was read.)

Mr. Clark: Well, perhaps "retained" would be a happier word. I will change the question to make it "retained" instead of "employed."

A. I was retained by the Treasury Department in the case of the Amerex Holding Corporation, which involved the valuation of a large amount of Chase Securities Corporation stock. I was retained in two cases involving the value of the Christiana Securities Company and the Delaware Realty & Investment Company, both of them large holding companies. I was retained in the A. W. Mellon case to value the stock of the McClinton-Marshall Construction Company. I was retained in the Tex-Penn Oil Company case, and in the Cecil H. Gamble case, involving the value of stock of the Procter & Gamble Company. I was retained last year in the matter of the Maytag Company case, and the prior year, to the Fulton Sylphan case, that

is, the security involved. The case, I believe, was Henry Hudson v. Commissioner. I was retained by the Government in the Daniel Guggenheim Estate case, which involved the valuation of $25,000,000 of open accounts and a million shares or more of the stock of the Anglo-Chilean Nitrate Corporation. I was retained in the case of—I believe the title of the case was the Western Power Company, but I am not certain of that. The valuation involved approximately a hundred and fifty million dollars of stock of the Pacific Gas & Electric Company.

Is that sufficient? I can give you some more.

Q. 12. (By Mr. Clark). I think that would be sufficient, Mr. Merriman.

The Member: Well, let me ask you: You say you were retained by the Government in those cases. Did you, in fact, actually testify in open hearings in those cases, or did you merely advise Government agencies?

The Witness: I testified in all of those cases except in the Amerex Holding case, in which case the Government rested after the Petitioner had put in its case. All of the other cases I have testified in, and perhaps fifteen or twenty more.

Mr. Clark: Do you wish to cross-examine on the qualifications?

Mr. Welch: It doesn't seem so. I don't know what you are offering him on yet. What is the offer?

Mr. Clark: He is offered in rebuttal testimony as to certain testimony on the part of the Petitioner as to the ability of the Maine Company and Mr. Prince to acquire bonds in the New Jersey Company. He will give opinion testimony as to the accumulation of gains and profits on the part of the Maine Company as an expert, and also as to the valuation of the interest in the stock of the New Jersey Company which the Maine Company had in the years in question, and possibly in two or three other matters.

Mr. Welch: I do not seem to find anything missing to which I want to object, except on the point of accumulations. He said it would be testified as to the accumulations in the Maine Company. Presumably you mean by that that he will testify as to accumulations that have been unreasonable.

Mr. Clark: Yes.

Mr. Welch: On that point I have difficulty as to his qualifications, but if Your Honor differs with me I shan't be shocked.

The Member: I have nothing to differ with you.

Mr. Welch: I mean the mere fact that I have difficulty with his qualifications. I merely do not admit his qualifications on the point of testifying as to the reasonableness or unreasonableness.

The Member: Do you object?

Mr. Welch: I object to his testimony on that single point of

Q. 13. (By The Member). Let me ask you one question: You say you have testified in numerous cases before the Board of Tax Appeals and in courts involving tax questions.

A. Primarily valuation matters, Your Honor.

Q. 14. Well, have there been other issues besides valuation issues in which you have testified?

I notice you hesitate. I do not mean to inquire. I do not mean for you to search your memory very closely, but is that the thing that you generally testified about, or can you think of anything else? A. Yes, sir; I can't at this time. I can't think of anything else, except I have testified as to marketability of securities, marketability, and matters that bear on valuation questions.

Q. 15. Yes.

Now, can you say whether there have been any cases where your testimony has been offered, and by reason of objections to it your testimony has been excluded, or you have

not been permitted to testify by the tribunal? A. No, sir; there has never been an occasion where my qualifications have not been accepted for the purpose of the testimony for which I was offered.

The Member: Now I will hear your objection, Mr. Welch, if you have one.

Mr. Welch: Well, I still have not heard anything that would seem to indicate that he could give the reasonableness of a policy of accumulating surplus to meet obligations. If Your Honor feels otherwise, as I stated, I won't be shocked.

The Member: I will hear him.

Mr. Welch: Note an exception.

Q. 16. (By Mr. Clark). During the years 1930 to 1933, were you dealing in bonds and preferred stocks on behalf of clients and for yourself, both on the Exchanges and over-the-counter markets of the country? A. Yes, sir; I was dealing on a very substantial scale.

Q. 17. Referring particularly to the years 1932 and 1933, will you give the Board some idea of the volume of your dealings? A. I did a very large volume of business in railroad and industrial bonds and preferred stocks, and a considerable volume of business in common stocks, both on the Exchanges and over-the-counter. It was not unusual for me at that time to accumulate, for the account of clients for whom I had full power to act, blocks of a million dollars par value or more of individual issues of bonds and also preferred stocks. The total volume of my dealings in those years it would be very difficult for me even to approximate, but it probably ran upwards of twenty million dollars.

Q. 18. Was all this business done on the Stock Exchanges? A. No, sir;—by no means. The bulk of it was in issues that were listed on the New York Stock Exchange, but a considerable amount was done over-the-counter.

Q. 19. Do you mean you bought and sold many listed bonds off the Stock Exchange? A. Yes, sir. It is characteristic of the bond business, and it has been for a period of all the years in which I have been dealing in financial matters, that there is more business in listed bonds done over-the-counter than there is on the New York Stock Exchange, and the same thing applies to other Exchanges as well. It is inherent in the bond business. The Stock Exchange commission is either too high or too low, and bond dealers in number five, six, or seven thousand throughout the United States do not generally belong to the Stock Exchange. The nature of their business is such that the best markets in everything, except a relatively small percentage of a listed security, listed on the Stock Exchange, is found over-the-counter. That is true of high grades and medium grades as well.

If one wanted to buy a block of a hundred thousand dollars of Standard Oil 2¾ or Atchison General 4's at the present time, the Stock Exchange is not the place in which the order would be likely to be executed; it would generally be executed over-the-counter between the two bond houses.

Q. 20. I rather think you answered this question I am about to ask, Mr. Merriman; if so, just tell me.

How would you compare the volume of dealings of the listed bonds over-the-counter and on the Stock Exchange, which is done year in and year out? A. In general, the volume over-the-counter is very substantially larger than it is on the Stock Exchange, with the exception of bonds, which are convertible into common stocks, that are also listed where the prices of the convertible bonds are such—the prices of the stock in which the bonds are convertible is at a level which makes the conversion attractive; in other words, where the bond has taken on the characteristics of the common stock of a somewhat speculative character.

Q. 21. Have you ever bought or sold as many listed bonds over-the-counter as were dealt in on the Exchange? A. I have frequently bought ten or twenty-five or fifty thousand par value of bonds or sold such an amount over-the-counter, with the total volume of dealings on the New York Stock Exchange in that day might be one bond or five bonds, or possibly no bonds at all.

Q. 22. Have you ever been requested to make an investigation as to the market in the securities of the Chicago Stock Yards Company and its subsidiary and affiliated companies? A. Yes, sir; I have.

Q. 23. What years have you covered in your investigations? A. Generally, I covered the years from 1927 to 1933. I checked certain figures as far back as 1923.

Q. 24. What issues did you investigate? A. I investigated the Chicago Junction Railroad, that is the elevated road, 4 percent bonds due 1945; the 5 percent bonds of the Maine Company due 1961; and the 4 percent and the 5 percent bonds of the New Jersey Company due in 1940.

I also checked the market for a short period of time in preferred stock of the New Jersey Company and the 9 percent stamped common stock of the New Jersey Company, and collected a little information as to the prices of Central Manufacturing District, series A and B, bonds which have serial maturities.

Q. 25. Are any of those bonds listed on any Exchange? A. Yes, sir. Two of them are listed on the Boston Stock Exchange, the New Jersey Company 4's and 5's.

Q. 26. Those are bonds due when? A. Due in 1940.

Q. 27. Do you have a summary of the volume of sales and prices of these listed bonds in the years which you have investigated? A. The prices have, I believe, already been introduced in evidence as—I think it is Petitioner's Exhibit 38, but I am not certain of the number.

The volume of trading in the 4's and 5's from 1923 to 1933 I have before me—the figures of them.

Q. 28. From what source did you obtain that information? *A.* That information was obtained from the weekly issues of the Commercial and Financial Chronicle, which report the total sales and the high and low prices of all securities dealt in on the Boston Stock Exchange and a great many other exchanges in each weekly issue.

Q. 29. State whether or not that is a publication recognized by the financial community.

Mr. Welch: I think His Honor knows all about it.

The Member: Do you admit it?

Mr. Welch: I think so.

Q. 30. (By Mr. Clark). Will you give us the volume of sales in high and low prices by years from 1923 to 1933? *A.* I do not have that memorandum as to prices in front of me, Mr. Clark. I believe they are already in evidence.

Mr. Clark: That is correct, is it not?

Mr. Welch: Yes.

The Witness: The volume of sales of 5's in 1933 was $161,000; of 4's, $65,000.

Mr. Welch: That is face value?

The Witness: Yes, sir.

Mr. Welch: What was the amount of the 4's?

The Witness: Sixty-five thousand dollars.

In 1932 it was $191,000, 5's, and $99,000 4's.

In 1931 it was $161,000 5's, and $51,000 4's.

In 1930 it was $168,000 5's, and $113,000 4's.

In 1929 it was $490,000 5's, and $99,000 4's.

In 1928 it was $95,000 5's, and $28,000 4's.

In 1927 it was $138,000 5's, and $33,000 4's.

In 1926 it was $290,000 5's, and $133,000 4's.

In 1925 it was $320,000 5's, and $109,000 4's.

In 1924 it was $374,000 5's, and $119,000 4's.

In 1923 it was $294,000 5's, and $80,000 4's.

The total for the period, if I have added correctly, is $2,672,000 5's, and $929,000 4's.

Q. 31. (By Mr. Clark). Did you obtain prices on Railroad bonds due in 1945? *A.* I obtained bid and asked prices for that issue of securities and have taken off a record of the highest prices at which offerings of those bonds were made.

The Member: What bonds?

The Witness: The Chicago Junction Railroad, the Elevated Railroad.

The Member: Oh, I thought—

The Witness: Four percent bonds.

The Member: I thought it was a general question about Railroad Company bonds. You mean this thing that is called the Railroad Company in this case?

Mr. Clark: Yes, sir. I thought that was identified—

The Member: All right.

Mr. Clark: By the due date 1940. The question might be more specific.

The Member: Well, I didn't realize that.

Go ahead.

A. (Continuing) The markets I obtained, in general, ran from '26 to 1933, though, unfortunately, I did not have available records for the year 1929 in the major source from which such quotations are obtained on over-the-counter securities, these bonds being unlisted. It is necessary to go to the best established source of quotations for over the counter securities, and that is the National Quotation Bureau which publishes daily, monthly, and semi-annual summaries of bids for and offers of unlisted bonds of all types.

Q. 32. (By Mr. Clark). These prices are regarded as a reliable guide to the over-the-counter market in bonds? *A.* Yes, sir; I think they are regarded as the best guide of

the history of price movements of over-the-counter bonds that is available.

Q. 33. What did your investigation disclose with respect to these Railroad Company 4 percent bonds?

Mr. Welch: Object.

The Member: Why?

Mr. Welch: He is talking of bid and asked prices. The bid price and asked price does not equal a sale.

The Member: It may be relevant, nevertheless. I will overrule the objection.

A. The prices I have taken here are not bid prices. They are prices—they are asked prices solely, and I have taken the range of the lowest price at which bonds were offered by brokers, and the highest price at which they were offered by brokers for the years in question. The bid prices on this issue ordinarily would run one to two points below the asked price, but since it is important to know at what price some bonds would be available, I felt that the asked price was a guide as to their availability, a better guide than the bid price.

In the year 1933, the highest asked price for those bonds was 75, and they were offered as low as 67½.

The Member: You are answering—

The Witness: Percent of par.

The Member: You are answering only with regard to the asked price for periods when there was no actual price?

The Witness: When there was no actual sale available in public records.

The Member: That is to say, whenever you were unable to find an actual sale price, you have ascertained the asked price from whatever sources were available?

The Witness: Yes.

Mr. Welch: I didn't—

The Witness: That is, the highest asked price, Mr. Welch.

Mr. Welch: Yes.

The Witness: These are not bid prices.

A. (Continuing) For 1932, the highest asked quotation was 80, and the lowest was 62.

For '31, it was 85 at the highest figure, and 73 as the lowest.

For the year 1930, it was 83, highest, and 78½ lowest.

As I stated, I was unable to get the year 1929.

For the year 1928, the high asked price was 89½, and the low, 82½.

For the year '27, 89½, 84½ low.

And for the six months ended December 30, '27, 85½ high and 83½ low.

Q. 34. (By Mr. Clark). Did you obtain prices on the Maine Company 5 percent bonds? A. Yes, sir. Similarly, and from the same source, I obtained the following asked prices:

In 1933, the highest asked price, 70½; and the lowest, 62¼.

In '32, the highest asked, 79; the low, 64.

In '31, the high asked, 87; the low, 70.

In 1930, the high, 90, and the low, 84¾.

Q. 35. Did you investigate to see whether there was an over-the-counter market for Jersey Company 4 percent and 5 percent bonds? A. Yes, sir; I did.

The Member: Well, I think it is important with regard to each of these particular bonds about which the witness is asked to testify, that when he gives the asked prices, as I understand he has just given, with regard to the Maine Company bonds, that it also be made clear whether or not he has made an investigation and the result of it, if he has, as to the actual sales or sales' prices so that we may know whether the asked price is different from a sales price, or whether there is a sales price.

Q. 36. (By Mr. Clark). You have heard what His Honor has said. Can you make a statement relative thereto, Mr. Merriman? A. I have made no special investigation as to that point, because that necessitates the obtaining from the numerous brokers who were bidding for and offering these particular bonds their private records. One might go through one brokerage house and find that over a period of several years he dealt in a hundred thousand of those bonds; another house might have dealt in only twenty-five of them, and so on, and it would necessitate a great deal of search to obtain the information, and then it would be questionable whether it would be evidential in character.

I know from experience that bonds that are actively quoted in the National Quotations Bureau, and the Standard Statistics sheets of bond offerings and bids have reasonable markets, where the bid, let us say, is 80, and the asked price is 82, that the sale tends to take place a little under the asked price and a little over the bid price. That is not invariably the case, but in general it is true that, if a broker is offering bonds at 82, a medium grade bond where 80 is bid, that you can buy those bonds at about 80½—81½, and if you were to attempt to sell him bonds, he would probably pay you 80¼ or 80½.

Q. 37. Now, I will renew the question which I asked you: Did you investigate to see whether there was an over-the-counter market for Jersey Company's 4 percent and 5 per cent bonds? A. Yes, sir; I did.

Q. 38. And what did you discover? A. I found Jersey 4's quoted as follows, from 1933 going backwards: the high asked price, 93; the low asked price, 85.

And in 1932, the high asked, 90; the low asked, 68.

In '31, the high asked, 96; the low asked, 81⅜.

In 1930, the high asked, 95; and the low asked, 90.

And for the year 1928, the high asked, 92½, the low, 92.

In 1927, the high asked, 93; the low, 90.

And in 1926, the last half of 1926, I should say, the asked 91, and the low 90. Jersey 5's—

Q. 39. Well, let me ask you at this point, were those the Jersey 4's? *A.* Those were the Jersey 4's.

The Jersey 5's in '33, I found the asked prices to have a range of 101 high, 93¼ low.

In 1932, 98¼ to 83.

In '31, 104¼ and 90.

In 1930, 103, and 100.

In 1928, 103 and 98.

In 1927, 102 and 100¼.

In the last half of 1927, 101½ and 97¾.

The Member: Now, as to those bonds of the New Jersey Company, will you say whether or not there were in all or any of those years that you have named actual sales?

The Witness: I have no personal knowledge of actual sales.

The Member: Would you say that you had no personal knowledge of whether there were actual sales or not?

The Witness: Over the counter?

The Member: Any way.

The Witness: I have no knowledge of actual sales of any of those bonds; that is, personal knowledge.

Q. 40. (By Mr. Clark). Now, is that for the same reason that you gave relative to some of these other bonds about which you have testified?

Mr. Welch: I object to that. The fact that he has no personal knowledge is the final thing. The reason he has is of no importance.

Mr. Clark: I think it is of importance.

The Member: Please read the question.

(Question read.)

Mr. Clark: Well, strike it.

Q. 41. (By Mr. Clark). Have you made any investigation relative to that?

Mr. Welch: To what, sir?

Mr. Clark: Relative to actual sales.

A. No, sir; I have not contacted brokers and dealers scattered through the United States, whose names appear in the National Quotations Bureau of records as having been active in the market in these bonds during that period of time. I know that it cost the brokers money—

Mr. Welch: Just—

A. (Continuing)—to list these offerings and bids with the National Quotations Bureau, and I am certain that the frequency with which those quotations appear, that a reasonable volume of business took place.

Mr. Welch: I move to strike the answer after the words "No, sir."

The Member: Yes, I think so. It is because of your questions, Mr. Clark, that that comes about. The witness should answer specifically, and when he goes on beyond it, you never know how far he is going, and he is not to be the judge of that. You asked him whether he made any investigation, and that does not call for gratuitous discourse on what difficulties brokers have in filing their—

Mr. Clark: I was going to follow it with another question.

The Member: Suppose you do. I will strike the last part of the question.

Q. 42. (By Mr. Clark). Why did you fail to make such an investigation?

Mr. Welch: Objection. His reason for failing to make it is of no importance. He just didn't make it.

Mr. Clark: He has explained in the prior instance what the situation is, and the difficulty of going from brokerage house to brokerage house in order to get the private records, the actual number of sales. Now, the same situation, I as-

sume, applied here. I would like to have him testify as to whether or not that is true.

The Member: I will let him testify to that.

1. I did not make an investigation with brokers since over a period of time there were probably 100 brokerage houses that appeared as bidding for or offering these bonds, located, some of them, in Boston, some of them in Chicago, some of them in New York, and some of them in other parts of the United States. And I went no farther than to convince myself that there was a reasonable over-the-counter market for those securities.

Q. 43. (By Mr. Clark). What source did you go to for these records which you have given in this instance? A. I went to the National Quotations Bureau for my annual bond summaries. I checked those, the prices which appeared therein against another publication that is less used, but is used to a great extent; that is, the Standard Bond Offerings published by the Standard Statistics Company, and I further checked certain of them in the Commercial and Financial Chronicle, which gives over-the-counter bid and asked prices for these securities for certain years.

The Member: I don't understand this at all. Did I understand you to say that it is a simple thing to get bid and asked prices, but it is an extremely difficult thing to get actual sales prices?

The Witness: Yes, sir; it is just like real estate. The sale price—

The Member: Why is it more difficult for brokers to send in the actual sales prices than it is to send in the bid and asked prices?

The Witness: The brokers could send in their sales prices but the brokers' sale prices always—virtually always is a double price. He buys at one price from a dealer and sells at another price to a client. The broker is not in the

business of accumulating these bonds; he is in the business of dealing in them, and he buys a bond at 81 and sells that bond at 81½ or 82, and he does not wish to publish to the world the price at which he sold it. That is his personal business. Nor does he wish to publish to his client that he has made a profit of half a point or maybe 2½ points on such a transaction.

The Member: But I understand he is perfectly willing to and it is entirely convenient for him to send in the demand price given to him by someone who sells he is willing to sell at such and such a price?

The Witness: Yes, sir.

The Member: And the other price that is offered by some one who is willing to buy?

The Witness: Yes, sir.

May I show you why he does that? The reason for these listings is that there is no central meeting place for the brokers and dealers who do business over-the-counter in which they make their offerings in the fashion that they are made on the floor of the New York Stock Exchange. Therefore, if a broker has an order to sell certain bonds of the XYZ company, in order to have that order known not to one or five or ten but to hundreds of people who are in the bond business as dealers, he lists his offerings during the day with the National Quotations Bureau or his bids, as the case may be. The National Quotations Bureau publishes those in the form of a series of mimeographed sheets which are sent to all subscribers, which number several thousand among the leading investment houses, over-the-counter houses, banks and insurance companies, and financial institutions who are watching the markets in these bonds and stocks through the sheets of the National Quotations Bureau in the same fashion that owners of listed securities tend to watch their securities in the paper.

If the broker having these ten XYZ bonds for sale doesn't know who it goes to, he picks up the daily sheet of the National Quotations Bureau, and he may find that on that particular day somebody wants to buy ten or twenty of those bonds, so he immediately contacts him on the telephone, and instead of the necessity of calling up a thousand brokers, he finds the best market as a rule by calling two or three or a dozen.

The Member: Then that publication is a wholly different publication and with a wholly different function from the Commercial and Financial Chronicle which merely is a publication after the event of what has happened?

The Witness: Yes. Yes, sir. This is a service publication to investment dealers and over-the-counter houses, banks, and financial institutions that have dealings in over-the-counter securities.

The Member: Go ahead, Mr. Clark. I never heard of this National Quotations publication before, so that I was entirely ignorant of it.

Q. 44. (By Mr. Clark). Now, will you state, Mr. Merriman, whether or not in your opinion it would have been possible to have bought a considerable portion of the outstanding $14,000,000 Jersey bonds between 1916 and 1933 at a considerable discount below par by consistently bidding for them on a competitive basis? A. Yes, sir. I am certain that a very large proportion of that issue could have been acquired in the open market during those years merely by maintaining bids approximately equal to the best bids shown in the market.

Q. 45. Does the same thing hold true with respect to the 6 percent preferred stock of the Jersey Company? A. Yes, sir; it does.

Q. 46. Have you made an examination of Petitioner's Ex-

hibit No. 2, the lease of the Railway Company by the Chicago River and Indiana Company? A. Yes, sir.

Q. 47. And have you examined the Petitioner's exhibits which are the Interstate Commerce Commission's decisions as to this lease? A. Yes, sir.

Q. 48. Have you made any other investigation as to the Chicago River and Indiana Railroad and its earnings? A. Yes; sir; I have examined the final valuation report on the New York Central Railroad issued by the Interstate Commerce Commission, which final valuation report includes the valuation of the property of the Chicago River and Indiana as well as the property of the Chicago Junction Railway Company, the company that is called the Railway Company in this case. I have further examined the earnings of the Chicago River and Indiana Company—

The Member: What is that I. C. C. reference officially?

The Witness: The valuation report in Interstate Commerce Commission valuation Docket No. 1022, New York Central Railroad Company, et al., continued. It is the second volume of the valuation report of the entire New York Central system, being of two volumes, and this, I believe, is volume 29—or 28. Excuse me.

The Member: Isn't there an I. C. C. report reference, or doesn't it appear in the I. C. C. report?

The Witness: I am not certain whether this number, Your Honor, D-751 is a reference number or not.

(The volume referred to was handed to the Member by the witness.)

The Member: No. 28 Valuation Reports 1.

The Witness: I have also investigated the earnings of that company for a short period of time prior to its lease of the Chicago Junction Railway Company properties, and the earnings of the company subsequent to that time—that is, from 1922 to 1933.

Q. 49. (By Mr. Clark). Where did you obtain this data? A. I obtained it from Moody's and Poor's Railroad Manuals, from the issues from 1922 to 1934, inclusive.

Those figures, I should say, are issued to the Interstate Commerce Commission, and the Moody's and Poor's statements are simply a restatement of the same figures in a somewhat condensed form.

I have checked certain of these figures in Moody and Poor against the Interstate Commerce Commission's statistics of railways in the United States, which is their annual publication, giving complete statistics on all Class I, II, and III railways, and on all switching and terminal railways in the United States.

Q. 50. State whether or not Poor's and Moody's Manuals are well recognized sources of statistics with respect to railroad securities. A. Yes, sir; they are.

Q. 51. Have you had particular occasion to study the New York Central Railroad and its subsidiaries in recent years? A. I believe I mentioned an occasion in my qualifications a considerable time when I have been engaged by the New York Central in connection with a valuation of its properties in the State of New Jersey, which has necessitated a valuation of the entire system, and an examination of both the earnings and financial position of the parent company, as well as that of a number of its subsidiaries.

Q. 52. Have you prepared a table giving the annual earnings of the Chicago River and Indiana Railway? A. Yes, sir; I have.

Q. 53. What period does it cover? A. The years 1921 to 1933, inclusive.

Q. 54. And from what source was that prepared? A. That was prepared from the sources which I have mentioned, Moody's and Poor's Manuals.

Q. 55. You have a copy of that table? A. Yes, sir.

(The witness hands papers to Counsel.)

Mr. Welch: Are you offering it?

Mr. Clark: I am about to.

I offer this in evidence, Your Honor.

Mr. Welch: I object to it on the ground that the testimony shows that it is prepared from hearsay. It may be very dignified hearsay, but it is nevertheless hearsay.

The Member: That is as to Poor's and Moody's Manuals?

Mr. Welch: Poor's and Moody's, with some checking, as I understand it, from the Interstate Commerce Commission's reports.

The Member: Is there not on the face of the proposed exhibit a statement of the precise sources from which the figures have been derived, Mr. Clark?

Mr. Clark: Yes, sir.

The Member: Suppose you hand it up and let me look at it.

(A paper was handed to the Member.)

The Member: Is it correct, Mr. Merriman, to say that every figure on this exhibit can be checked by reference to Moody's Railroad Manuals of 1922 to 1934?

The Witness: Yes, sir; so far as I know. I personally checked a substantial portion of them. Some of them—the table was prepared by my staff.

The Member: Is it correct to say that with regard to the column of each year that it can be checked with the Moody Railroad Manual of that year?

The Witness: No, sir; the Moody Railroad Manual of the subsequent year.

The Member: Now, is that universally true with regard to this exhibit, so that if you were to check the figures in the 1923 column you could do so by going to the Moody Railroad Manual of 1924?

The Witness: In general, it is true, Your Honor, and it

is possible that, since Moody generally publishes two or three and sometimes five years' earnings, statements, and balance sheets, that some of the figures for 1923 might have been taken, let us say, from the 1925 number. The figures, however, have been carefully checked in my office against Moody's Manuals for that period.

The Member: In my opinion, it is only necessary, in order to see to it that this exhibit is fairly in evidence, that the Petitioner be given an opportunity to check it with its sources and a very clear statement of the way that that checking can be done; that is to say, it should not be left to generalization, such as that in some instances this particular type of check would not yield any result but another type has to be adopted. It is not fair to require the adversary to search too far to find the places where the checking can be satisfactorily done. So that if the proffer of this exhibit is accompanied with the sources made available to the Petitioner's Counsel together with reasonable assistance as to how the sources and where the sources can be found, there will be no objection. That is a matter of expedition, expediency. Otherwise I will have to reject the exhibit, because it is based upon something else which is not in evidence.

Mr. Clark: Of course it is offered subject to check, Your Honor.

Q. 56. (By Mr. Clark). Mr. Merriman, could you within some reasonable time supply the Petitioner with the precise sources, that is, the issues of the Moody Manual from which these particular figures can be checked? *A.* I could probably within a reasonable time—that is, by tomorrow morning—do so. I might have to contact my office, because a full file might not be available here.

In general, I will say that you will find in the later years of the period five years' earnings reported in each Moody

Manual; that is, 1934 manual you will find five years ending in 1935. In some of the early periods I know that there are one or two or three years available in one manual.

The Member: I suggest the offer be withheld until the Counsel have ascertained whether or not they cannot agree upon the sources and be assured that the sources are satisfactory. If that be done, the objection would be obviated. Until that is done—

Mr. Clark: Well, can't we put it in subject to check, Your Honor?

The Member: I do not think there is anything to be achieved by that, because it will necessitate a motion to strike in the event it is not available. The witness says he can do it by tomorrow morning, so that by tomorrow morning I think a satisfactory adjustment of this can be reached.

Mr. Welch: I might say that I have every confidence in the accuracy, but I want to do the work at this end of the table, and I think some checking should be done.

Mr. Clark: Very well, Your Honor. The offer will be withheld.

The Member: It might be better if it is marked for identification.

Mr. Clark: Yes.

The Member: What is that, four times N?

The Clerk: Yes.

Q. 57. (By Mr. Clark). Now, have you prepared balance sheets for the road from the year 1921 to 1933? A. Yes, sir; from the same sources.

Q. 58. And do you have a copy of that table? A. Yes, sir.

(The witness hands a paper to Counsel.)

Mr. Clark: This I intend to offer, Your Honor, but, of course, it is in the same situation as the previous one.

I ask that it be marked for identification at this time.

The Member: That will be marked for identification as OOOO.

Q. 59. (By Mr. Clark.) Have you investigated the financing of the New Jersey Company in 1915; that is, the original issue, the $10,000,000 5 percent bonds? A. Yes, sir; I have done so.

Q. 60. And have you secured data as a result thereof? A. Yes, sir. I checked the report of the issuance of that sale of $10,000,000 of 5 percent bonds of that company in the Commercial and Financial Chronicle of April 10, 1915, volume 100, page 1261.

Q. 61. Now, at what prices were those bonds sold? A. They were sold at 99 and interest, yielding approximately 5.05 percent to the investor.

Q. 62. And what did the prospectus show as to the amount available to yield interest charges?

Mr. Welch: I object. That is so far back.

The Member: Well, its antiquity has nothing against it, if that is all you have to say about it.

Mr. Welch: If we are going into the prospectus—I do not know whether we are not, but that is what it seems to be leading to.

The Member: He is asking what did the prospectus show.

Mr. Welch: Go ahead. I don't care.

The Witness: The combined earnings of the Union Stock Yards & Transit Company and Chicago Junction Railway Company, securities of which were deposited as collateral for this issue of 5 percent bonds, were shown to have been, in 1914, $2,104,000; in 1913, $2,168,000.

I am reading these in round figures.

The year 1912 is not given.

1911, $2,102,000.

The Member: We will take a short recess.

(There was a short recess taken.)

The Member: All right. Proceed.

Q. 63. (By Mr. Clark). When did you first begin a study of this Chicago Stock Yards Company? *A.* Late in November of 1938.

Q. 64. Did you do that at my request? *A.* Yes, sir.

Q. 65. You were furnished with the preliminary copy of the stipulation and the exhibits at that time? *A.* Yes, sir.

Q. 66. And were you later furnished the revised stipulation and additional exhibits which have been filed here with the Board? *A.* Yes, sir.

Q. 67. Have you had any assistance in this investigation? *A.* I have had from two to four of my staff working on various phases of it almost continuously since I was retained in the matter.

Q. 68. Now, have you made a study of the earnings of the Maine Company and of its balance sheets and those of its subsidiaries, and of those of the New Jersey Company and its subsidiaries for 1933, and prior thereto? *A.* Yes, sir; I have.

Q. 69. Have you examined the dividend record of the Maine Company from its formation to 1933? *A.* Yes, sir.

Q. 70. Have you studied the policy of other corporations in the United States to ascertain the relation of their dividend payments to their earnings for a period of years prior to 1933? *A.* Yes, sir.

Q. 71. Will you outline the nature of this study? *A.* I took the statistics of income published by the Bureau of Internal Revenue of the United States Treasury Department and examined the reports which showed corporations earning profits for the years 1923 to '33. I might say that '23 was the first year in which the figures of earnings and dividends of corporations reporting profits were published by the Bureau of Internal Revenue. And I calculated the percentages of dividends in relation to income for corpora-

tions in various categories that are shown in those annual reports, taking all manufacturing corporations as one group, taking food companies as another group, taking trarsportation and public utilities as a third group, and taking banks, insurance, finance, and holding companies as a fourth group.

The Member: Let me hear the question.

(The question was read.)

Mr. Clark: I really don't think the answer of the witness, Your Honor, was quite responsive to the question that I asked.

The Member: Well, that is what I thought. The question as to "have you studied the policy of other companies," I don't know what the Bureau of Internal Revenue statistics would have to do with that. Still, it may have a lot to do with it.

Mr. Clark: Well, I am not sure, perhaps if I could have the answer read as it was given to the question "Will you outline the nature of your study," I might be able to make up my mind as to whether to have it stricken or not.

The Member: Well, read from the first question that you read, that I asked you to read, from thereon.

Is that what you mean?

Mr. Clark: Well, he answered that he has studied it.

The Member: And go on from there.

Mr. Clark: Yes.

(The record was read as follows:

"*Q.* Have you studied the policy of other corporations in the United States to ascertain the relation of their dividend payments to their earnings for a period of years prior to 1933? *A.* Yes, sir.

"*Q.* Will you outline the nature of this study? *A.* I took the statistics of income published by the Bureau of Internal Revenue of the United States Treasury Department and examined the reports which showed corporations earn-

ing profits for the years 1923 to '33. I might say that '23 was the first year in which the figures of earnings and dividends of corporations reporting profits were published by the Bureau of Internal Revenue. And I calculated the percentages of dividends in relation to income for corporations in various categories that are shown in those annual reports, taking all manufacturing corporations as one group, taking food companies as another group, taking transportation and public utilities as a third group, and taking banks, insurance, finance, and holding companies as a fourth group.")

Q. 72. (By Mr. Clark). Now, did you make reference to Standard Statistics Company? A. I had not completed the statement with respect to the study that I have made. I further studied the composite of financial statements of leading American railroad and industrial corporations, which has been published for a number of years past by the Standard Statistics Company, which shows the figures of earnings and dividends as well as other data, and I made a separate study of all of the stock yards companies in the United States which published reports as to their financial condition and published earnings, their earnings and their dividends that could be located in Moody's and Poor's Manuals.

There were seven of those stock yards companies which that data was available for from 1925 to 1933, and there were a smaller number which I carried back as far as 1921.

Q. 73. Now, I am not sure whether you have included in answer to this question, in the answer that you have given with respect to your first study, what the statistics covered. A. That was a study from the statistics of income published by the U. S. Treasury Department, covering the years 1923 to '33, and shows a table which I have prepared from that, shows the net earnings and cash dividends paid and

the percent paid in dividends by all manufacturing companies earning profits, by food companies, transportation and public utility companies, and banks, finance, insurance, and holding companies.

Q. 74. What did you understand as to the source of these Treasury Department figures? *A.* I understand they are compiled by the Treasury Department from the income tax returns.

Q. 75. Now, have you a typewritten summary of the data for the corporations you have referred to? *A.* Yes, sir; I have.

Mr. Welch: Are you offering it?

Mr. Clark: Yes. Excuse me. I didn't know you had finished your investigation.

Yes, I offer this in evidence, Your Honor.

Mr. Welch: I think Your Honor might glance at it while I state what I have to say.

(The paperwriting referred to was handed to the Member.)

The Member: I have it before me.

Mr. Welch: I object to this offer on this ground: It seems to me impossible to encompass in this trial any adequate inquiry into the capital set-up and averages of these various companies, how their stock was held, whether by individuals or widely separated, what their maturities were, what their reasons were for saving money, so that these huge averages of companies and in a widely separated field seems to me to have so little probative value in this case, that I think the exhibit as a whole becomes immaterial and should not be received.

The Member: I agree. I will sustain the objection.

Let the exhibit be marked, so that any question as to

its exclusion will be identified with the paper. It is four times "P," isn't it?

The Clerk: Yes.

Mr. Green: That is marked just for identification?

The Member: It is marked for identification, and the record shows that it is excluded from the evidence.

Mr. Clark: I will make a proffer, Your Honor, in just a moment.

The Member: Isn't that a proffer? That is why I had it marked for identification. It has been described and the paper itself is now clearly identified, and that is excluded.

Mr. Clark: But I ought to make a proffer of the purpose for which it is offered, shouldn't I, in case of appeal?

The Member: Oh, I don't know.

Mr. Clark: Yes, I think so.

The Member: I leave that to you.

Mr. Clark: I offer this as showing the basis on which the witness relied in arriving at his opinion, which he has stated, or arriving at the opinions he stated.

The Member: What opinion? The opinion as to what?

Mr. Clark: No, I am wrong about opinion.

Well, he has made a study of the earnings of the Chicago Stock Yards Company, and now, in the course of his study of the policy of other corporations in the United States, he has resorted to this as one of his sources of information, and for that purpose it is offered.

The Member: Yes. Well, now, the rationale of my exclusion is that, as I understand it, the only probative force that this exhibit, or proffered exhibit could have, would be upon the question of the reasonableness of the accumulation of the taxpayer here in respect of subdivision (b) of section 104 of the statute, and it seems to me that it is going beyond the realm of any possible decision that the Board may be required to make, to have that reasonableness as

to this particular taxpayer tested by the similarity of the ratio of its dividends to its earnings with the composite ratio of the dividends to the earnings of all of the other corporations in the United States who file income tax returns, and who are to be assumed, without evidence, to be included within the report of the Treasury Department as to the statistics of such corporations classified as the Treasury Department may have classified them in this report, without an identification of the particular corporations; and if the identification of the particular corporations were proffered, I should say that that would have to be excluded because it goes far beyond the realm which this case can take.

I perhaps should add that there are other reasons that occur to me, which it seems to me are unnecessary to be stated in the light of the all-inclusive and all-embracing statement that I have made. If it becomes necessary, I think that there would be a number of others that I should have to state.

Q. 76. (By Mr. Clark). You have stated that you have made a study of the dividends and income based on certain data published by Standard Statistics Company? A. Yes, sir; I have done so.

Q. 77. You have described what the Standard Statistics Company is? A. I do not believe so, but it is—

Q. 78. Excuse me, then. Will you please do so? A. It is the largest financial statistical organization in the United States, and probably in the world. They have been in business for a period of perhaps 30 years, and furnish a very large mass of statistics to investment organizations of all types with respect to corporations and economic organizations in the United States.

Q. 79. What did your study of that disclose?

Mr. Welch: I object to that. It is such a broad question, I just don't know how to deal with it.

The Member: Well, doesn't this relate to the same field that we have just been discussing in connection with the proffered exhibit?

Mr. Clark: Yes, Your Honor, I expect so.

The Member: I will sustain the objection.

I don't know where the line is to be drawn between the data which I may properly consider and the data which I may not, but I think I will have to exclude this on the ground that it goes infinitely further than any line which might reasonably be drawn. I suppose we could go on from now on to doom's day and consider the practices and results of the practices of all the corporations in the world, and then test it by that, but I can't believe that that is our job.

Q. 80. (By Mr. Clark). Have you made a study as to the Stock Yards Companies in the United States? *A.* Yes, sir; all stock yards companies of which I could—about which I could obtain data as to their earnings and balance sheets.

Q. 81. Where did you obtain these statistics? *A.* From Moody's and Poor's Manuals, volumes between 1922 and 1934.

Q. 82. Have you put this data in the form of a table? *A.* Yes, sir; I have.

(A paperwriting was handed to Mr. Clark by the Witness.)

Mr. Clark: I will offer this in evidence, Your Honor.

Mr. Welch: Objection on substantially the same grounds as the Exhibit PPPP, which was excluded.

Mr. Clark: This stands on a very different basis, Your Honor.

The Member: Well, I will have to have you elucidate that.

Mr. Clark: Well, here are definite stock yards which are set forth, and these are statistics from Moody's and

Poor's Manuals. This isn't an indiscriminate lumping, as you might say, of a whole lot of unidentified corporations. These are perfectly identifiable.

The Member: There is so much reasoning that has to be done, and I find it difficult to say what it strikes me is the necessary ruling about this exhibit, but I will have to take a chance on what the courts will have to say about this, because the subject has never been adjudicated, and there has never been any expression on it. But it strikes me that the statute cannot be construed so as to suggest that in determining whether there has been an accumulation of earnings and profits beyond the reasonable needs of the business of any corporation—perhaps that is too broad; perhaps I needn't go that far and better not—but as to the reasonable needs of the business of a corporation such as the taxpayer here, whom you might call a non-operating company in order to avoid the use of these terms "holding" or "investment" companies, that the reasonableness of the accumulation of its earnings and profits is to be tested by a comparison of the ratio for the last 15 years of the dividends of other corporations engaged in one way or another in a similar business, the similarity of which is only disclosed by their titles which include the words "stock yards"; that is, the ratio of their dividends actually declared and paid as shown by the publication to their earnings and profits as shown by that publication.

Now, I guess I have to take the chance on being wrong, but it seems to me inconceivable that this statute can be applied by that means, and although I realize that the exclusion of the evidence of this kind in this case necessarily must be based upon a ground so broad that if it is sustained it will exclude similar evidence in thousands of other cases, nevertheless it seems to me clear that the test can-

not be by this means, and I shall have to exclude the evidence and sustain the objection.

Let the exhibit be marked for identification as QQQQ.

Mr. Clark: I offer the original, Your Honor.

The Member: Let me ask you, Mr. Clark, whether there is any support in books or opinions of the Board or in the opinions of any of the courts for applying the statute by this type of test, or whether this is a new venture on your part?

Mr. Clark: Yes, Your Honor. I think the National Grocery Company case, the language of the Supreme Court, which I do not have before me, but to which—or, in which, rather, reference was made to the test.

The Member: Well, yes. You mean this language that I read the other day in the course of the discussion—

Mr. Clark: Yes.

The Member: —in which the question of reasonableness was likened by Judge Hand to the question of reasonable care in tort cases?

Mr. Clark: Yes, sir.

The Member: Well, I have that in mind, but I would like to know whether there are other instances where this type of evidence, statistical evidence and comparisons, has been used as the standard by which that question of reasonableness is to be influenced.

Mr. Clark: No; I do not know of any.

The Member: All right.

Mr. Clark: I am afraid that I did not ask an exception.

The Member: Well, you have an exception as to all of these exclusions.

Mr. Clark: Yes. Thank you.

And I make the proffer for the same purpose and in the same way as in the other case.

The Member: Yes.

Q. 83. (By Mr. Clark). You have an extra copy of this last, Mr. Merriman? *A.* Yes, sir.

(The witness hands a paper to Counsel.)

Q. 84. Now, Mr. Merriman, you have already stated that you have examined the stipulation of facts and the exhibits attached and the exhibits that have been introduced in evidence at this hearing by both the Petitioner and the Respondent. *A.* Yes, sir.

Q. 85. Have you heard the evidence of witnesses, or read the record in the case of their testimony? *A.* Yes, sir.

Q. 86. Of all of them? *A.* I have either read the full record or I have attended the hearings personally on such days as I have not read the record.

Q. 87. Now, in the light of all this, and your special training and business experience, have you an opinion as to whether in the years 1930, 1932, and 1933, the Maine Company was a holding or an investment company?

Mr. Welch: Objection.

The Member: The objection is sustained. That is a question of law and the statute on which the witness may not competently testify.

Q. 88. (By Mr. Clark). Have you formed an opinion as to whether in these same years the Maine Company accumulated gains and profits beyond reasonable needs of the business? *A.* Yes, sir.

Q. 89. And what is that opinion? *A.* My opinion is that it did so.

Q. 90. Will you state your reasons for that answer? *A.* Yes, sir.

My study of this corporation was, first, for the purpose of determining the income of the Maine Company historically; second, for the purpose of determining the source of that income; and, thirdly, the reliability of that source.

Therefore, I first studied the Railway Company, since

that was the largest single contributor to the income of the Maine Company indirectly, and I studied the Transit Company and its subsidiary, the Produce Terminal Company, which is a direct subsidiary of the Maine Company, Central Manufacturing District; and I checked to some extent the portfolio of the companies' own assets to see what earning power might be indicated thereon.

Now, the lease of the Railway Company provided an income of $2,000,000 a year, from which certain taxes had to be paid. Of that income, some $626,000 went to the Transit Company and the balance was the income of the Railway Company; but I did not think it important to split those two items, since the source was the Railway Company.

The--

The Member: Let me interrupt. I am thinking too much about something else, and I want to get it off my mind.

Will the Reporter read, please, the question that was asked preceding this one, where the witness was of the opinion that it was a holding company?

(The record was read.)

The Member: I will change my ruling as to that. I will overrule the objection and permit the question to be answered, the question being as to whether you have an opinion as to whether it is a holding or an investment company.

Mr. Clark: Very well, Your Honor.

Now, perhaps the testimony which the witness has given so far on the question following that had better be completed now, and then we will go back to the question of the holding company.

The Witness: It is immaterial to me, Your Honor.

Mr. Clark: Well, Your Honor--

The Member: Well, did you intend to pursue it any further than to ask him categorically what his opinion is?

Mr. Clark: And state his reasons.

The Member: Oh. Well, all right, let the record show, then, that I am overruling the objection to the question as to whether he has an opinion, permitting that question to be answered, and then I will let you go on in any way you choose about that. If you want to take up the earlier inquiry, I do not care. I do not want to have this witness go on talking while I am thinking about something else.

Q. 91. (By Mr. Clark). Well, now, Mr. Merriman, which would you prefer? Can you pick up your trend of thought on this question which you were answering when His Honor interrupted, if you stop at this time and go back to your opinion as to the holding company? *A.* I think it would be simpler to go back to the holding company.

Q. 92. Very well.

The Member: Now, answer the question as to whether you have such an opinion as to the holding company.

The Witness: I have.

Q. 93. (By Mr. Clark). And what is that opinion? *A.* This company is a holding or an investment company.

Mr. Welch: Just a minute. I think for the sake of the record I should note an objection here.

The Member: I overrule the objection.

I am overruling the objection only because I think there is still some uncertainty as to whether the statutory terms "holding and investment company" are terms upon which evidence is properly admissible, or whether they are terms of law on which the decision of the Board must be made, irrespective of the testimony, or whether they are common or garden terms on which the law is uncertain. That being the state of my own understanding of the law as it is at present, I am not willing to let the record exclude that evidence.

You may answer the question.

Mr. Clark: What was the question, Mr. Reporter?

(Last question read as follows:

"*Q.* And what is that opinion?")

A. My opinion is that it was a holding or an investment company.

Q. 94. (By Mr. Clark). And will you state your reasons for arriving at that opinion? *A.* My reasons for that opinion are, first, that the company was originally set up for the acquirement of a controlling interest in another holding company, so that in its inception it was a holding company of a holding company.

The Member: Mr. Welch, does the Petitioner dispute that the Maine Company was a holding company?

Mr. Welch: No. The only word I am allergic to is the word "mere."

The Member: The answer is that the Petitioner does not dispute that the Maine Company is a holding company; is that correct?

Mr. Welch: I am prepared to state that the Maine Company is a holding company.

The Member: Well, we can get the witness' exposition on the theory of that.

Mr. Welch: I think I ought to add that I claim that the Maine Company is something in addition to a holding company, but, among others, it is a holding company.

The Member: The question that has been put, the question that the witness is answering, is whether in his opinion it is a holding or an investment company. Now, as to the holding company, you admit it is a holding company so that he does not have to elaborate on that.

Q. 95. (By Mr. Clark). In your opinion, did it exercise any other functions than that of a holding company?

Mr. Welch: I object to that. That seems to be clearly a factual matter.

The Member: Well, that embodies several things. It

embodies his conception of a holding company, and as to that it is a question of facts.

Mr. Clark: Then, Your Honor, he should be permitted to continue with his statement as to his opinion that it was a holding company. He was interrupted, and I do not think that he had finished.

Had you, Mr. Merriman?

The Witness: I thought I had finished.

Mr. Clark: You had.

The Member: Then, you are all through.

We are all on very thin ice here. The words here have all come together in a way that makes it difficult for anybody to know what is included and what is excluded. The statute says that a corporation is a mere holding or investment company.

Mr. Clark: Then, don't you think that that is a question for expert testimony?

The Member: I would respectfully decline to express an opinion on that. I had something to say about that language in the statute in the Rand case. I thought I was shortening it by getting the Petitioner to admit the substance of the answer to your question. If I was not, I do not suppose I accomplished very much.

Mr. Clark: Did I have a pending question? There was an objection. Has that objection been ruled on?

The Member: We will see what the state of the record is.

(The record was read.)

The Member: Well, I will sustain the objection only because I do not know whether the witness is being asked for facts from which it can be determined that it was a holding company, or whether he is being asked about an opinion about something which embodies several facts not stated.

Mr. Clark: It is his opinion based entirely on the stipulation and the record evidence in this case.

The Member: I know, but your question is, Is it in your opinion doing something? Now, if the corporation is doing something, it is a matter of fact as to what it is doing, and from that you can proceed.

Mr. Clark: Well, I will rephrase the question.

Q. 96. (By Mr. Clark). In your opinion, based on your examination of the entire record including the stipulation of facts and the exhibits, do the facts which therefrom appear as to the activities of the company make it, in your opinion, anything more than a holding company?

Mr. Welch: Objection.

The Member: I will overrule that objection.

Mr. Welch: May I say, I do not know whether there is any point about it, but here we have all the facts, and this witness is asked as an expert to draw what seems to me a legal conclusion from those facts.

Is this a holding company? That conclusion, it seems to me, is within Your Honor's province and not in the province of the witness.

The Member: Well, the Board cannot permit that province to be taken from it by any testimony that this or any other witness may give. That does not mean that the witness may not express an opinion, if it is helpful in leading the Board to its conclusion.

The Petitioner's witness Blough used the term "holding company," and at my instance he said that that term was used in the vernacular, so that that took it out, I thought, of the question of the meaning of the word in the statute.

I think that anything any witness may say on that subject is less than enough to take the question away from the Board for decision, and the Board may have the power, and indeed may have the duty, to make the decision, irre-

spective of what thousands of witnesses on the subject may think or testify.

Mr. Welch: May I have my exception noted?

The Member: Yes.

The Witness: May I have the question?

(Last question read as follows:

"*Q.* In your opinion, based on your examination of the entire record including the stipulation of facts and the exhibits, do the facts which therefrom appear as to the activities of the company make it, in your opinion, anything more than a holding company?") *A.* No, sir.

Q. 97. (By Mr. Clark). Will you state your reasons for that statement?

Mr. Welch: I think I will note an objection, because I object to the whole line.

The Member: The objection is overruled, with an exception.

A. The Maine Company for years past, according to the tax records in the case, had had a purely nominal organization. It had a president, who drew a large salary; it had a treasurer, who in the years involved in this case drew a salary of $500 a year; it had an operating staff, which drew total salaries of $2,000 a year; its office rent was an average of three or four hundred dollars a year, which, in my opinion, is clear evidence that it undertook no supervision over the affairs of the companies in which it had substantial interests other than that, which was provided by the president of the holding company, who was, in turn, either president or chairman of the board of the sub-holding company, and who was also president or chairman of the board of the Railway Company and of the Transit Company and trustee of the Central Manufacturing District. It is inconceivable to me that Mr. Prince, as president of the Maine Company, would give himself orders as president of the

Jersey Company to transmit orders to the Union Stock Yards & Transit Company of which he was chairman of the board. It is inconceivable to me that any function of supplying advisory management by the Maine Company could have been conducted under an office expenditure such as is shown in the income tax returns in this case. The policy of the company has revealed in its—

The Member: You mean the tax returns for the years 1930 to 1933?

The Witness: '33; yes, sir.

The Member: There were a great many tax returns entered in the case for years other than those.

The Witness: Yes, sir. I have examined no data in this case beyond the year 1933.

The Member: How about prior to 1930, the years prior to 1930.

The Witness: The years prior to 1930, the same situation prevailed so far as my examination of those records went back for some years. I was reviewing this company in the critical years of the period and not reviewing its activities in 1915, or thereabouts, because I understood that this question would be asked with respect to these years and not with respect to its origin.

1. (Continuing) The record of income of the Maine Company shows that continuously for a considerable number of years, it accumulated surplus—

Mr. Welch: Could we interrupt a moment? I wonder if that hammering could be stopped. I find it very difficult to hear.

The Member: I am hoping it will.

We will suspend now to a quarter after two.

(Whereupon, at 12:35 o'clock p. m., a recess was taken until 2 o'clock p. m. of the same day.)

AFTERNOON SESSION.

The Division resumed hearings at 2:15 o'clock p. m., whereupon the following proceedings were had:

MR. NORMAN MERRIMAN

having heretofore been first duly sworn, was recalled to the stand, and, was examined and testified as follows:

Mr. Clark: Mr. Merriman reminded me that he cannot remember where he was when the interruption came. Now, I have just been handed a copy of the transcript of this morning's testimony which I could hand him to read, but I suppose it would be better if the Reporter would read it.

The Member: Read the last part of what Mr. Merriman said.

Mr. Welch: We have a transcript here.

The Member: Oh. Well, Mr. Clark, suppose you read the last part.

Mr. Clark: Well, all right. Your Honor does not care to have the question read?

The Member: I do not want anything more than just to refresh the witness' recollection as to where he was.

Mr. Clark: Well, he is saying here, after the first few sentences:

"It is inconceivable to me that Mr. Prince, as president of the Maine Company, would give himself orders as president of the Jersey Company to transmit orders to the Union Stock Yards & Transit Company of which he was chairman of the board. It is inconceivable to me that any function of supplying advisory management by the Maine Company could have been conducted under an office expenditure such as is shown in the income tax returns in this case. The policy of the company has revealed in its—"

And then there is some interruption.

Then the witness resumes, after some discussion between Your Honor and himself as to prior years.

He says:

"The years prior to 1930, the same situation prevailed so far as my examination of those records went back for some years. I was reviewing this company in the critical years of the period and not reviewing its activities in 1915, or thereabouts, because I understood that this question would be asked with respect to these years and not with respect to its origin."

And then he continues.

"The record of income of the Maine Company shows that continuously for a considerable number of years, it accumulated surplus—"

And at that moment the interruption came.

Q. 98. (By Mr. Clark). Is that sufficient, Mr. Merriman, to refresh your recollection? *A.* Yes, sir. Accumulated a large surplus which was used as a possible financial reservoir for the emergency needs of the subsidiary and affiliated companies on certain occasions in 19—between '30 and '33, but which was used regularly as a source of financing the chief stockholder of the company, and also as a means of buying securities from him, which securities were not, in my opinion, of the general type that one would expect a large enterprise of this type to carry as a basic financial reserve.

I think that summarizes my reasons for considering this a holding company with no managerial or operative functions.

Q. 99. Now, in the same way, we were in the middle of your answer to a question, the precise form of which I have forgotten, as to the accumulated gains and profits of the Maine Company, and whether they were beyond the reasonable needs of the business.

Mr. Clark: Mr. Reporter, are you the one who took that record?

The Member: Mr. Merriman, don't you remember where you were?

The Witness: I remember just about where I was.

The Member: That is on the occasion when I interrupted to change my ruling as to a prior question.

Mr. Clark: I can find it here in the transcript.

The Witness: I was discussing the stability of the income of the Railway Company.

Mr. Clark: But I would just like to have it clear what question that is to which the witness is now continuing his reasons. Much has intervened.

Q. 100. (By Mr. Clark). The question was this—I find it in the transcript: "Have you formed an opinion as to whether in these same years the Maine Company accumulated gains and profits beyond the reasonable needs of the business?"

All right.

A. Yes, sir. I believe I had outlined the fact that this Railway property lease was made to the Chicago River and Indiana Railway Company, which became on the date of the lease a wholly owned subsidiary of the New York Central Railroad, having theretofore been controlled by Union Stock Yards & Transit.

The Chicago River and Indiana earning record after the date of this sale of stock and lease of property by the Railway Company in this case has been a very imposing record to indicate that this income is unusually secure and unusually stable.

A survey which I made some short time ago indicated that the two most profitable switching and terminal railroads in the United States were the Indiana Harbor Belt Railway and the Chicago River and Indiana Railway. The earnings of this company were in spite of the very severe depression that took place in the critical years of this period sufficient

to build up the cash position of the railroad from the end of 1930 at $917,000 to the end of 1933 of $3,321,000. At the same time, there was practically no change in the current liabilities of the company. The company had been earning sufficient to pay very large dividends to the New York Central on its stock, dividends which in some years ran as high as 500 percent.

The Interstate Commerce decision of 1928, which is in evidence in this case, shows that the operations had been highly profitable to the New York Central. The original Interstate Commerce decision showed that the Commission expected that the New York Central would obtain direct benefits of considerable value in addition to any earnings that it obtained from the operation of the properties, and in view of the fact that the railroad, the lessee of this property, which was responsible for the $2,000,000 a year rental, was earning a large surplus over requirements in the lean years in the history of the railroad business for many years back, I think that that source of income must be looked on as one of very unusual strength.

The Maine Company had another subsidiary. The Railway Company was not a subsidiary of the Maine Company; it was a subsidiary of the Jersey Company. But the Maine Company had a direct subsidiary, Produce Terminal Company, which was a utility company supplying electric light and power to the stock yards district of Chicago and to the Central Manufacturing District.

The earnings of this company showed the most remarkable and consistent growth during the period from 1920 to 1933, inclusive, of any utility company whose reports I have ever examined for that period of time.

The highest earnings of the company in its history up until 1932 were recorded in the year 1932, in spite of the fact that that was the extreme depth of the depression, and in

spite of the fact that this company's business was chiefly supplying the power to the industrial companies. So that it was to have been expected that as industry fell off this company's income would fall off, but it did not do so. In the year 1933, its profit, aside from the loss incurred in the banking—no—as a result of the banking situation was almost equal to that of 1932.

The earnings for several years ending in 1933 were about $350,000, and that company stood on the books of the Maine Company at the end of 1933—in fact, for the entire period—at a million thirty-two thousand total investment, although it was earning approximately $350,000 a year net and paying the Maine Company $200,000 dividends.

Q. 101. May I interrupt and ask whether or not that is the adjusted figure to which you have just referred?

The Member: What, the million thirty-five thousand?

Mr. Clark: Yes.

The Witness: Yes, sir; that is the figure shown on the adjusted balance sheet—the balance sheet adjusted in accordance with the stipulation.

Q. 102. (By Mr. Clark). Very well, then, proceed, Mr. Merriman. *A.* There was one other minor asset of the New Jersey Company which had exceedingly stable income and very high degree of safety, and that was the $2,500,000 bond issue of the Indiana Harbor Belt Railway owned by the Jersey Company, and that paid interest at the rate of 4 per cent; so that there was another $100,000 of extraordinary stable income.

Then I pass to the stability of income of the Transit Company. The Transit Company had in the year 1932 a large profit of a non-recurring character due to the re-weighing charges, which were taken in the income in that year. It could thereafter expect to receive additional income on account of the re-weighing services, but it could not look for

ward to more than perhaps one hundred seventy-five or two hundred thousand dollars a year of such additional income.

The Transit Company also had a large loss as a result of bank transactions, which loss, in my opinion, should be charged to surplus as a non-recurring item, just as I think the profit should be credited to surplus as a non-recurring item, because the losses that happened perhaps once in a lifetime from an extraordinary situation such as resulted in banking troubles of 1931 and 1933 I do not think should be regarded as influencing the regular income from the company's business.

Now, the income from the company's business had been showing a tendency to fall off modestly—not seriously, but modestly. That was due to various causes, but I think the major cause was undoubtedly the reduction in export of cattle from the United States to the rest of the world. In the period from, say, 1870, to the end of the war the United States had been a tremendous exporter of cattle to Europe chiefly, and to some extent to other parts of the world. A good share of that live stock went through the Chicago market and was shipped from there to points for trans-shipment by boat to Europe. The aftermath of the war developed the nationalistic policies of the European nations and their need for producing the maximum possible amount of their own foodstuffs, and consequently the export business in cattle declined very much, and the Chicago Stock Yards felt that more keenly than any other of the major stock yards in the West. That factor, I think, is pretty well completed as influenced by the end of 1933, since the cattle shipments of the United States conformed to such small proportions by that time and I believe that with a return to normal business conditions in the United States there would have been a tendency over the next few years for a slight increase in the earnings on the Transit Company's business rather than a

decrease, though on valuation basis I think it would be sufficient to consider that it was no better than a stationary trend. Nevertheless, it was a very different business from an ordinary manufacturing business, being a service business in an indispensable raw material of the food industry, and the entire record of the Transit Company's earnings shows a degree of stability which would be counted on by any corporation which was deciding its dividend policy on the basis of the stability of income indicated by its major earners. That I think is sufficient with respect to the stability of income.

Now, the surplus of the Maine Company by 1929 had been built up to a rather remarkable figure in view of the fact that the initial investment in the business was $1,000,000 in cash. The book surplus as of 1929 was $19,615,000, in round figures, as shown on these adjusted balance sheets. In 1930 that had risen to $22,184,000; in '31 to $24,142,000; in '32, to $25,915,000, and in '33, to $27,759,000.

Now, as I have stated, the balance sheet figure for Produce Terminal is completely out of line with any figure of value that I think it would be possible to assign to a business of that character. I think it would not be possible to value that business at less than $4,000,000 or four and a half million dollars. The investment—

The Member: You mean as against the $1,032,000?

The Witness: That is correct.

4. (Continuing) The investment in New Jersey Company common stands on the books at $10,933,000 at the end of '29, and slightly more than that in 1930. And this figure of the New Jersey Company asset value on the books does not give effect to the remarkable change that has taken place in the last 20 years in the basic—in the value of the most important asset of the New Jersey Company, which I conceive to be the Railway stock. If one treats the Railway enterprise as

a whole it does not split the income between the Railway Company and the Transit Company.

I have reviewed the earnings of the Chicago Junction Railway Company in the years prior to the execution of the lease to the Chicago River and Indiana in 1922, and it should be noted, I think, that in 1913 that property, the bulk of that property was leased by the Transit Company for $600,000 a year, and there was a small amount of additional property owned by the Chicago Junction Railway, and in 1922, nine years later, that entire property was leased for $2,000,000. That is a gain in income for the properties represented by those Railway properties of a gross of $1,400,000, approximately. It should be noted that at the time of that lease, the first lease that fixed a rental to the Transit Company, that the earnings of the Junction Company had previously been set on a two-thirds and one-third basis, two-thirds of the earnings going to Transit and one-third of the earnings to the Railway, and one-third of the earnings to the Railway on that basis would have indicated an expectation of earnings of $300,000 a year, on the assumption that $600,000 was a reasonable rental to the Transit Company. That would then make the net gain in income from that source around $1,100,000 in the period of eight years, and I do not think that the Jersey Company stock on the balance sheets reflects that remarkable gain in income in any fashion whatever.

The cash of the Maine Company—

The Member: Well, how would you reasonably think it should be reflected?

The Witness: I think it is a factor in considering the dividend policy, the increase in income and the increase in value of the holdings as a factor that would always be considered by—

The Member: Well, I am not asking you that. You say that the increase in the income has not been reflected upon

the balance sheet of the New Jersey Company. I am asking you how, in your opinion, it should have been reasonably reflected upon the balance sheet of the New Jersey Company.

The Witness: That implies no criticism whatever.

The Member: I am not talking about that.

The Witness: As to the balance sheet.

The Member: How should it have been reflected, in your opinion?

The Witness: I don't think it should be reflected. I think that except in case of a recapitalization of the Maine Company or a reappraisal of those assets, that it should be continued to be carried at the book cost.

The Member: What is the significance, then, of your statement that that is a factor which has not been reflected upon the balance sheet of the New Jersey Company? I assumed when you spoke that you thought that that was a significant fact.

The Witness: I do think it is a significant fact, that one of the major assets has perhaps appreciated in value ten or fifteen million dollars, and that that is not shown on the balance sheet.

The Member: I take it, then, that you think that if there were a correct representation upon the balance sheet of the value, that that would increase the asset side of the balance sheet by $15,000,000; is that it?

The Witness: That was just for illustration, that $15,000,000, but it would have been a very large increase in the asset item on the balance sheet had they in each year valued their holdings in these subsidiary companies at a fair market value instead of at book cost. And I think a board of directors in determining a dividend policy should consider whether the assets have shrunk or whether the assets have increased. And that will not be reflected on the balance sheet unless adjustments are made for the internal purposes of

the directorate, and they need not be made on the books of the company until there is a final sale of the property or something of that kind.

The Member: Well, have you an opinion as to the—I am leaving out of consideration any question as to whether it should actually have been stated on the balance sheet, but let's treat it as something that intelligent people would recognize, even whether it is on the balance sheet or not. Have you an opinion as to the extent to which there would be a fairly recognizable increased value of the cost assets over and above the balance sheet assets if a proper recognition had been had of this increased earning from that source.

The Witness: I expect to be asked a question by counsel with respect to the valuation of one of these major assets, Your Honor.

The Member: All right. I want to have the reflection of the assets stated somewhere. If I am anticipating, I will quit.

The Witness: Yes, sir.

In addition, I might comment that the companies' own 5 percent bonds in the treasury of the company were being carried at the end of 1933 at $3,165,000, in round figures, and that their par value was nearly a half a million dollars above that figure, and had the companies seen fit to retire those bonds, it would have had that additional gain to its surplus, since they were a liability of the company.

Now, in consideration of the surplus position of the Maine Company, I think it is important to observe that in spite of the losses incurred in the banking—as a result of the bank situation during this entire period the surplus of the individual companies, whose balance sheets have been introduced in evidence, such individual companies underlying the Maine Company, showed practically no change in the period from 1929 to 1933; three of the companies showed a small increase

in surplus totaling altogether $1,512,000; and three of them showed a decrease totaling $1,500,000. So the subsidiary companies' surplus changes during the four-year period from 1929 to 1933 were nominal.

Now, for the year 1930 the subsidiaries showed a net increase of $482,000; for the year 1931, a net increase of $231,000; for the year 1932, a net increase of $1,770,000, and that is the year in which the very large re-weighing charges were taken in the income; and in the year 1933 there was a decrease of $2,462,000.

The cash position of the company, taking only two major items from these balance sheets, we have the cash and other notes receivable. Those other notes receivable were chiefly notes receivable from F. H. Prince or F. H. Prince & Company, brokerage firm. The totals of those two items were $9,793,000 at the end of 1929; $11,157,000 at the end of 1930; $11,204,000 at the end of 1932; and $12,213,000 at the end of 1933. That does not include the subordinated cash.

Now, this company at the time that these cash resources of the parent company were piling up, and at a time when it had already accumulated very large amounts of surplus—I think I should say at this point I feel the position of this company at the end of 1929 indicated that it had built up more than adequate reserves to take care of such things as reasonable business men would expect might confront this particular company.

And at the time that these loans were made to the companies' chief stockholder in 1930, and to a minority stockholder in 1932 and 1933, they were made at the interest rate when it was possible to buy in the companies' own obligations, or the obligations of its important subsidiaries, at, in general, a very substantial discount below par. And I think that dividends to its stockholders would be a more logical policy than loans to stockholders that bore substantially less interest

than could be obtained by the retirement of the companys' own securities.

In that connection, it should be commented that the company had one subsidiary company that was in a bad position.

The Member: Mr. Merriman, will you be more specific in these identifications of people and events that you are talking about? I do not want a doubt left as to whom you are referring and to what you are referring by using abstract general terms.

Now, what is this subsidiary company you are talking about? Which company?

The Witness: Well, I was just about to mention the name.

The Member: Well, as to the loans made to so and so, without saying who it is, I would have to suspect that you mean F. H. Prince or F. H. Prince & Company.

The Witness: The loans were made to F. H. Prince and F. H. Prince & Company, which, I understand from the record, is an investment banking firm for Mr. F. H. Prince.

The Member: Now, I will ask the Reporter to go back to the place where he is referring to a combination of cash and receivables, and then there is some talk about the person from whom these receivables were held. That is what I want to get. I want to get a specification of just exactly what it is you are talking about, and I do not want to have to do it by inference if you can give it to me by specific reference.

(The record was read.)

The Member: That is what I mean, the company's chief stockholder was F. H. Prince.

The Witness: And Mr. F. H. Prince was minority stockholder in 1932, when F. H. Prince & Company, Inc., acquired by gift from Mr. Prince 60 percent of the stock.

The Member: Will you just bear in mind the fact that I want these identities shown as you go along.

The Witness: Yes, sir.

What was the last?

(Last answer read as follows:

"In that connection, it should be commented that the company had one subsidiary company that was in a bad position.").

The Witness (Continuing): This is the Elevated Company, which was leased to a company which was succeeded by the Chicago Rapid Transit Company. The earnings of the Chicago Rapid Transit Company had been on the down grade for a number of years prior to 1932, and some time in 1932 it defaulted on its obligations.

The New Jersey Company guaranteed payment of principal and interest on the four percent bonds due 1945 of that Elevated Railroad Company in the sum of $2,327,000, and as guarantor it had, I think, at that time, every reason to expect that it would be necessary to continue to make good on that guarantee for some time. Therefore, in view of the fact that the bonds in 1932 had 13 years to run, and since they could have been bought at—the same volume—at prices in the neighborhood of 80 or even perhaps as low as 65 to 70, I believe it would have been sound business policy to acquire those bonds instead of piling up cash in surplus, which was earning much less than could be obtained by the investment in the obligation that was guaranteed by the company's chief subsidiary, the Jersey Company.

I think that summarizes my reasons for feeling that the company did not distribute its gains in accordance with—that the company accumulated surplus beyond the reasonable needs of the business.

Mr. Clark: I would like to correct myself, Your Honor, for the purpose of clarity of the record. When I stated the question, to which this was a continuation of response, I stated the question as to whether or not the witness had formed an opinion as to the Maine Company having accumu-

lated gains and profits beyond reasonable needs. As a matter of fact, of course, this is an answer to a question for his reasons for the statements which he gave.

The Member: You understood that, did you not, Mr. Merriman?

The Witness: Yes, sir.

Mr. Clark: I just mention that so that the record will be clear.

Q. 103. (By Mr. Clark): Just let me ask at this point, Mr. Merriman—I do not know whether that has any bearing on this particular answer, but I am afraid I will forget to ask it:

In the course of your preparation of this testimony, did you actually go to Chicago? *A.* Yes, sir; I did.

Q. 104. And did you make an investigation of these premises? *A.* I went to Chicago to get what I might term a bird's eye view of this enterprise, not for the purpose of making a detailed appraisal of any of its properties, but for the purpose of familiarizing myself as to the type of operations, and particularly the Central Manufacturing District, on which the record was very sketchy.

Q. 105. And you made that investigation? *A.* Yes, sir.

Q. 106. What is your understanding as to the character of the interest of the Maine Company during the years 1930, 1932, and 1933 in the common stock of the New Jersey Company which it then held?

Mr. Welch: I object to that. There are two or three things in the question that calls possibly for a characterization, and, therefore, I fear it.

The Member: Well, I think that is true. What the character of an interest is, I don't know.

Mr. Clark: I can tell you, Your Honor. We have had a great difficulty in drafting these questions really to this point for the reason that it is not merely the stock which is held by the Maine Company but there is also an added incre-

ment due to the contract of 1911, and the agreement of 1914 and the plan of 1911, which are an interest, and in evidence. I think if Your Honor will permit this to go in, and then if it seems that it is immaterial, a motion to strike will be properly in order, but this is the only way that I could figure to approach it. There is more than just the ownership of stock.

The Member: Well, can you make clear to the witness that you are not asking him for a legal characterization of the interest? If there is some kind of characterization that is within the peculiar field of this witness, assuming that he is an expert, I should think that he could answer it, and that, for example, would be illustrated by the use of the word "vernacular" by the previous expert witness. But, on the other hand, if there is any doubt about whether the witness is attempting to give a legal characterization about it, the question might be fatally vulnerable.

Mr. Clark: Well, he is not going to, Your Honor.

The Member: Well, if you will ask him to exclude a characterization, maybe I can let it in.

Mr. Clark: Well, I do ask you, Mr. Witness, to exclude any legal characterization in your answer.

The Member: I will overrule the objection on the question as so qualified.

Mr. Welch: An exception.

A. As I understand, the interest of the Maine Company in the New Jersey Company is evidenced, first by its holdings of common stock in that company which in the important years—in the years in question, was nearly 60,000 shares, and on the average 60,000. The company also appeared to have a contractual right to receive income from the New Jersey Company, that is, the Maine Company had this, by virtue of the contract of March—of 1914. I don't remember the exact date. And by virtue of the relinquishment of the right of the common stockholders of the Jersey Company to

receive that income in exchange for the 9 percent guarantee which the Maine Company gave in 1911 and thereafter to the New Jersey stockholders as set forth in the 1911 agreement.

This contractual right of the Maine Company is set forth in Exhibit S-46, attached to the stipulation, and, frankly, Your Honor, I am not sure whether the Maine Company owns common stock solely, and this contractual right is of no importance aside from the stock, or whether there is a marked difference between the value of the contractual right and the stock, and that is outside of my province to decide. I might undertake, as I expect to be asked, the value of both, but I wouldn't undertake to value the one separately from the other because of a lack of certainty of the legal status.

Mr. Welch: Well, if Your Honor please, if it adds anything to the gaiety of the nations or the proof on either side, I am surprised, but I don't think I will move to strike it. It doesn't seem to me that we have learned anything that we didn't know before the answer was attempted.

Q. 107. (By Mr. Clark): In the light of your examination of the stipulation, together with the exhibit attached thereto, the exhibits introduced by both parties at this hearing, and the other evidence of record in the case, and your special training and experience, have you formed an opinion as to the fair market value of this interest of the Maine Company in the common stock of the New Jersey Company held by it on December 31, 1930, 1932, and 1933; and let me add in that regard, Mr. Witness, that you may consider for the purpose of your response the term "fair market value" to mean the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair price, both having reasonable knowledge of the facts, will trade. *A.* I have.

Q. 108. Will you state your opinion in this regard? *A.* In my opinion, this stock, assuming it to be coupled with the contractual right to which I have referred, if there is any

separate identity between the two, is worth, in round figures, $23,400,000 in 1930; was worth, in round figures, $19,750,000 in 1932; was worth $20,200,000 in 1933, at the end of those particular years.

Q. 109. Now, will you state your reasons for arriving at those figures?

The Member: Now, may I interrupt to inquire as to what the figures are that are on the balance sheet of the books which these valuations would supplant if they were reported?

The Witness: Yes.

The Member: Twenty-three, nineteen, and twenty millions; isn't that right?

The Witness: Yes, sir. They would supplant valuations—the 23 million valuation would supplant a valuation of $11,036,509, in 1930; a value of $11,193,549 in 1932; and the valuation of $11,241,352 in 1933.

Q. 110. (By Mr. Clark). Now, then, I will renew the question. Will you please state your reasons for arriving at those figures? *A.* I have already commented as to the unusual stability of income of the New Jersey Company's chief subsidiaries, the Railway Company, and the Transit Company. Now, in searching for a rate at which to capitalize this income of a decidedly stable character, my first step was to take the prices that the—yields, rather, that were obtainable on high grade bonds at each of these year ends, and I have taken as a base from which the valuation is to be constructed, the yield on triple A bonds as published by Moody's Investors Service in December 31, 1930, of 4.47 percent; 1932, 4.51 percent; and 1933, 4.33 percent.

Taking bonds of a grade somewhat below, two steps below the triple A bonds, Moody's index similarly shows 5.36 percent for 1930, 6.47 percent yield for '32, and 6.05 yield for '33.

The Member: Those are composite yields, aren't they?

The Witness: Those are composite yields of 30 bonds of that grade, Moody's rating being used.

The yield obtainable by an investor on high grade industrial preferreds as of those same dates—I beg your pardon; these are the averages for the month of December of 1930, '32, and '33, using for that purpose the Standard Statistics Index of high grade industrial preferred stocks, which were, respectively, 5.77 and 9.34—or 7.34 in '32, and 6.50 in '33.

Now, income as stable as this income, which has in front of it a fixed charge due to a bond issue and a charge for a preferred stock dividend is entitled, in general, in my opinion, to about 50 percent increase over the yield that is obtainable on bonds of the company that have a rating of BA. This is an empirical solution of a valuation of property. I cannot give a demonstration of its validity, but I think it is common sense to say that if a company is reasonably capitalized and its bonds sell in the open market to yield 5 percent, that the investor in the common stock of that company, assuming there is no preferred in the picture, would expect that he would get around 7½ percent, if it is a corporation that is reasonably capitalized.

Now, on that general basis, I have projected a series—projected times earnings ratios for this New Jersey common stock interest of 11½ times earnings for 1930, taking 11½ times the latest year, rather than 11½ times the preceding five-year average; there would be virtually no difference between the two figures—for 1932, in view of the fact that medium-grade bonds and preferred stocks were selling to yield 6 to 7 percent, I have taken ten times earnings, which is a capitalization rate of 10 percent for this income, and in 1933 I have taken 11 times the earnings in each case, taking the earnings for the latest years as perhaps being more representative than the earnings of any series of preceding

years, since a series of preceding years would produce a slightly higher earning power.

Now, these figures—

The Member: Did you say that for 1932 you took a valuation of 11 times earnings?

The Witness: Well, 10 times earnings for '32 and 11 times for the end of '33.

The Member: Eleven times for '33?

The Witness: Yes, sir. The reason—

The Member: I thought you said before, and I am trying hard to keep abreast of you, but it isn't easy—I thought you had said before that you were speaking of a basis of something over 11 percent, and I hastily figured from that, that that would mean you were taking pretty close to a nine percent times capitalization rate, and now you are doing just the opposite. You are taking eleven times earnings, and I am confused. Perhaps you had better straighten me out on that.

The Witness: These capitalization rates work out in percent, roughly, nine percent in '33, ten percent in '32, and eight and a half percent in 1930. That is rough there. About 8½ percent in 1930. I haven't actually calculated those. I have just put them down on a times earnings basis.

I. (Continuing) I have reviewed a large number of major and some less important companies in various classifications to find what price earning ratios their stocks were selling for in 1930, '32, and '33. I might say that the one and a half times earnings of Jersey compares with 11.3 times for Union Stock Yards of Omaha. For Denver Union Stock Yards, the ratio is 13.6 times earnings as against 11½ that of Jersey. On the other hand, Sioux City was 8.7 as against 11½. The two approximately balance each other.

The capital market at the end of 1933, I think it should be stated, was decidedly better than it was at the end of

1932, at which time we still were in an era of banking difficulties, and there was a considerable degree of depression, of sentiment, although I do not think things were as blue as they were in the summer of 1932, when we had BAA bonds—

The Member: BAA bonds?

The Witness: Yes—down to about 12½ tc 15 percent basis, and there were a good many of them sold on a 20 years' yield, but there was a very striking recovery in the beginning of the month of July of 1932, which carried up to September, and then there was a slow sag-off to December, but the December, '32, prices of bonds, preferred stocks and high grade common stocks in general were very substantially above those of the low points of 1932.

The end of 1933, we had the banking situation pretty thoroughly cleared up with the Government guaranteeing on bank deposits of the type that the mass of the public worried about, I think the limitation at that time was $2,500, but I am not quite sure at this date. We had a quite notable come-back in industries, and a reasonable come-back in commodity prices. And conditions were decidedly more cheerful at the end of 1933, but one certainly couldn't call them buoyant. But interest rates on high-grade bonds at the end of 1933 were down to a lower point than they were at any time at any year end for quite a number of years past, and the yields obtainable on the basis of current earnings of industrial stocks that were engaged in businesses of a definite stable character were, generally speaking, substantially less than the yield that I have capitalized this Jersey stock at.

The Member: Were there any companies that had earnings of a definite stable character at that time?

The Witness: Any businesses? Or bonds?

The Member: Any businesses that had earnings of a definite stable character at that time? I suppose that everything was unstable then.

The Witness: We had a much greater degree of stability in the food industry, for one, than we had in the mass of manufacturing industries. As No. 2, you had a much greater degree of stability in the utility business, and, particularly, in the utility business where the companies catered to residential communities rather than to industrial territories.

We had a quite remarkable stability of earning power on the part of some railroads, certain of the coal railroads, Norfolk & Western, the Virginian; the Chesapeake & Ohio held their earning power exceedingly well during the depression due to the vital necessity of the transportation of bituminous coal for electric light and power producers.

There were, of course, a very considerable number of guaranteed railroad stocks, and where the guarantors under the lease, or the operating companies, either one, were earning substantially more than charges under those leases the yields were decidedly low in comparison with some of the speculative bonds that I am speaking about.

The Member: We will suspend now and take a short recess, and I will ask you, Mr. Witness, to keep in mind where you are so that you do not have to go through this business of refreshing yourself.

(There was a short recess taken.)

The Member: Now, can you pick up where you left off, Mr. Merriman?

The Witness: Yes, Your Honor.

I was speaking about railroad stocks of companies which were operated under lease by other railroads, and I have checked the yields on all such stocks as have an important public market, as well as the earning record of the company guaranteeing the lease, if that information is available.

At the year ends in question the better grade of such securities was selling at about 17 times earnings for the year 1930; about 15 times earnings for the year ending December

31, 1932, and about 16 times the year ending December 31, 1933.

Your Honor asked me if there were any other classes of companies which had relatively stable earnings. I have mentioned first the stock yards—

The Member: No, my dear sir, I did not ask you that. I asked you whether they had stable earnings. I did not say "relatively." I notice that your answer was entirely couched in terms of relativity. I can well understand that there were earnings which were more stable than other earnings, but I was referring to the general condition of affairs in the country at that time and asking, perhaps flippantly, as to whether any earnings were at that time properly to be regarded as stable.

The Witness: I think the earnings of the flour milling companies, some of the major ones, like Pillsbury, were quite stable. The earnings of the cigar companies were at least reasonably stable. And the earnings of quite a number of coal mining companies were quite definitely on an increase, and their securities reflected it.

I think that would summarize the valuation study, at least the high spots of the valuation study that I made with respect to this particular interest of the Maine Company in the New Jersey Company.

The significance of that, as I understand it, and a factor for consideration in this case, is that thus is it disclosed that the earnings and profits of the Maine Corporation were free for distribution to a greater extent than a mere examination of its balance sheets disclose.

The Witness: Yes, sir.

The Member: Is that right?

The Witness: I believe that is part of the issue.

The Member: I say, that is the significance.

The Witness: I think there is another significance that counsel has in mind.

The Member: I can find out from you what the significance is with respect to the opinion which you have formed and have undertaken to express here as to the reasonableness of its accumulation. You were asked to explain that, were you not?

The Witness: Yes, sir.

The Member: So I want to put this into the mosaic of your explanation of your answer to that question.

The Witness: Yes, sir.

I believe, however, it has another significance. I am not qualified to say that, because I am not too familiar with why this valuation question—why I was asked to answer this valuation question.

The Member: Oh, you are not answering, then—

The Witness: It has a dual significance, as I understand the term.

The Member: Well, I will let him state the significance from his standpoint. I thought that it had a significance from your own expert standpoint.

Mr. Clark: Well, to offset shrinkage in assets, Your Honor.

The Member: I beg your pardon?

Mr. Clark: To offset shrinkage in assets, Your Honor, which is claimed, and which is admitted to a certain extent.

The Member: You mean this blue line (indicating) in the last 3 years of this Exhibit 45, shrinkage of those assets?

Mr. Clark: Decline in other assets, on balance sheets, Your Honor. Reference was made in the stipulation to some of that.

The Member: How elusive that statement is to me, when I am trying to understand its immediate present signifi-

cance. That is not an unfair question for me to ask, or an unfair demand for my mind to make, is it?

Mr. Clark: Well, I am not criticizing that in any way, Your Honor. What I wanted was to make a little clearer. The bank loans were subordinated, which represents a decrease in assets.

The Member: Yes.

Now, the witness has taken that into consideration,—at least, he said so. When he spoke about the cash position and the loans he expressed that and he subordinated assets in their place.

Mr. Clark: Yes. The Maine Company also has subordinated assets.

The Member: Yes.

Mr. Clark: But those were not so dealt with by the witness.

(To the witness:) Were they?

The Witness: Yes, they were.

Mr. Clark: I withdraw the remark.

There is something now which I am reminded, and that is the value of these bank loans. As I recall, they have attempted to show, and perhaps with justification, that they were not worth the amounts which were advanced,—the bank loans, I mean, made by the Maine Company to the Chicago banks.

The Member: Well, now, this requires an awful lot of building stone on stone to get its significance.

As I understand it, then, and all I am concerned with at the moment, is the significance of this so-called hidden reserve represented by a valuing of these shares over and above the valuing which appears upon the books. Whereas upon the book value—you say the book value is not significant because there is an actual value that does not appear upon the books, irrespective of whether it should be

upon the books of the Maine Company or off the books; and I suppose that the significance of that was that that rate of value, which seems to be in the amount of somewhere from seven to eleven millions of dollars, the significance of that is to show that the earnings and profits which have been permitted to accumulate by this particular taxpayer corporation are in excess of the reasonable needs of the business, because there is eight to eleven million dollars more somewhere that has not been referred to.

I asked the witness whether that was what the significance was, and then he said that is one of the significances, but that you had another one, and now I thought you were going to tell me what the other one is.

Mr. Clark: Yes. I said the shrinkage, Your Honor.

The Member: It really comes to the same thing, does it not?

Mr. Clark: Well, perhaps.

The Member: It is merely a greater specification of the same doctrine, is it not?

Mr. Clark: Well, I think perhaps that is true.

Mr. Pierson: If Your Honor please, may I be permitted to make a statement in regard to that at this time?

The Member: Yes.

Mr. Pierson: In addition to that I think also there is this feature: The valuation of the New Jersey Company's common stock on the balance sheet of the Maine Company is being introduced in evidence here to show that there are assets on the books which have increased in value throughout these years, at the same time when they have assets on the books which have decreased, and I think admittedly decreased. Respondent does not say that those bank loans are worth the amount stated on the books; and it is for that reason that we introduce this evidence, to show to the Board that there is the offsetting item; so that it must be

considered in the light of the financial structure and condition of the corporation.

The Member: And that the forthcoming burden of 1940 is therefore not as great as they contend that it is, because they have got much more with which to cope than their books indicate that they have.

Mr. Pierson: Exactly so, Your Honor.

The Member: All right.

Q. 111. (By Mr. Clark). Have you considered this chart here, Mr. Merriman, which is marked "Petitioner's Exhibit 45," and which I hand you—I see you have before you a miniature. *A.* Yes, sir.

Q. 112. Have you given consideration to that? *A.* Yes, sir; I have.

Q. 113. And have you read the testimony that was introduced regarding it? *A.* I heard all the testimony that was introduced.

Q. 114. Will you please state your conclusions as to the correctness of that testimony and the accuracy of the chart.

Mr. Welch: Objection.

The Member: I will sustain the objection.

Q. 115. (By Mr. Clark). Well, what consideration have you given to this chart? *A.* I have felt that the chart should show the situation of the Chicago Stock Yards enterprise a great deal better than it does—

Mr. Welch: Objection.

The Witness: —if there was something added to it.

The Member: Wait just a minute. I will hear you on the objection.

Mr. Welch: I beg your pardon?

The Member: I will hear you on the objection.

Mr. Welch: He was asked what consideration he gave to this chart, and he started out with something in the nature of a criticism. I ask that the answer be stricken.

The Member: I think that is true.

I think, Mr. Clark, that you have to be more specific as to the question.

Q. 116. (By Mr. Clark). Well, what was the result of your consideration of this chart?

Mr. Welch: Objection.

The Member: Sustained.

Q. 117. (By Mr. Clark). Is there any addition which you think ought to be made to or subfraction from the elements which appear here on this chart in order to have it correctly reflect the statements which were made regarding it in the testimony of the witness for the Petitioner?

Mr. Welch: Objection.

The Member: I think you have got to be more specific than that.

I sustain the objection.

Now, do not think a witness can go on the stand and have blanket authority to say the chart is wrong, and this is why.

Q. 118. (By Mr. Clark). I call your attention to these lines here and the figures and ask you if you understand what they represent. *A.* Yes, sir.

Q. 119. Well, now, will you describe what they do represent to your understanding?

Mr. Welch: Just a moment. Let me consider that.

Well, go ahead.

The Member: Now, he has read it, and he is an intelligent person, so far as to this Court appears, and he knows what this red bar means as to each year, and he knows what this blue bar means as to each year. Now, let us find out whether there are factors or items which have in fact been omitted from the red bar or have been omitted, in fact, from the blue bar, so that he may state specifically which

items should be added to represent the assets of the blue or should be deducted from the liabilities of the red.

Mr. Clark: Well, that is what I thought.

The Member: I think you should be required to go in step by step that way so that your adversary can make his criticisms and objections as the witness' criticisms of the chart come up.

Q. 120. (By Mr. Clark). Well, I want to ask you, Mr. Merriman, what factors were included in the red bars—

Mr. Welch: Well, now, that would take a long time. Presumably, Mr. Green has answered it correctly. For the sake of brevity, why don't you ask him what he would put in that isn't there and what he would take out that is there?

Mr. Clark: That is what I did, and there was an objection, and the objection was sustained.

The Member: I don't think you did, but maybe you thought you did. I don't think you did, Mr. Clark.

Suppose you ask him that as to the red bars, and then ask him that as to the blue bars, and maybe we have a commitment of the other side that they are not going to object to it.

Q. 121. (By Mr. Clark). Well, what factors were included in the red bar, if any, or were excluded from it which, in your opinion, should have been excluded or included?

Mr. Welch: Objection.

The Member: I will permit that question to be answered.

Mr. Welch: Could I state the basis of my objection? It is so confusing, the double end of it.

Why don't you first have him tell what is in that should not be in, and then take up those that should be out. I am afraid we will get our minds all mixed up.

The Member: I have got to rule on these according to the substance of the question that is asked and not according to what you regard as a nicety of its form.

Mr. Welch: Go ahead.

A. The red bar, I think, is an entirely accurate representation of the requirements of money for the ultimate discharge of the funded debt represented by bonds, and the amount necessary to liquidate the New Jersey Company if it is found necessary to liquidate or desirable to liquidate the New Jersey Company.

The blue column is entitled on the chart "The resources to meet such requirements," and that blue column in effect represents the cash and current assets of the companies in question: that is, the Chicago Stock Yards Company, the Maine Company, and the underlying companies of the enterprise. Now, I do not think that at any time the cash resources are the sole or the proper measure of the resources to meet long-term financial requirements. I think that blue column might be divided into two parts. I mean, it might have an addition to it that would be given another column—given another color, or that would show the other tangible assets that are favorable to meet such requirements. Further, I think this chart without a picture of the surplus earnings over and above the annual fixed charges on them—it lacks something without that figure. In the early days of the formation of this company—

The Member: I think before I can really understand what you are talking about as to the blue column, perhaps I had better get a statement from you, and this goes back to Mr. Clark's question that was objected to, and maybe objected to when I asked—a statement from you as to what the blue column does comprehend. As I understand from you, it doesn't comprehend enough, and, therefore, I want to find out from you what you think it does comprehend.

The Witness: It comprehends, using the shortest term that I can use to describe it, the cash and other current assets, marketable securities, loans to Mr. Prince, and in-

vestments of a grade like the Indiana Harbor Belt Railroad investments, of not only the Maine Company but of all the subsidiaries in this enterprise all put together in one sum which makes up the figure of a little under 20 million dollars in the last two years of the period, and a little over 20 million dollars in the preceding two years of the period.

The Member: Does that mean that you regard the blue column as comprehending only quick liquid assets?

The Witness: Yes, sir.

The Member: And it does not include fixed assets?

The Witness: That is correct, sir.

The Member: Of a more durable nature?

The Witness: Yes, sir.

The Member: That is your first complaint about it, isn't it?

The Witness: That is my first complaint. Now, that is my only complaint to the columns. My second criticism is that to draw a conclusion as to the stability of this enterprise or its ability to refinance any of these obligations, it is necessary to have a visual representation of the surplus over fixed charges that is being and has been earned by this company over a period of years past, and I have taken the net income of the Maine Company from 1914 to 1933 as shown in the stipulation, and added that figure to the chart as a rough measure of the surplus over fixed charges on the total of these red columns in order to see how much was being earned on this funded debt.

The Member: When you say "surplus," do you mean book surplus?

The Witness: No, I mean the net income after charges of the Maine Company.

The Member: As per books?

The Witness: As per books; yes, sir.

The Member: And you don't intend to include in that surplus any valuation?

The Witness: No, sir.

The Member: That you may make?

The Witness: No, sir.

The Member: Outside of the books?

The Witness: That is the current annual income of the Maine Company, and that figure upon the scale on the basis of one-tenth of the original scale shows pretty clearly to me that beginning about 1922 this enterprise became a strong enterprise. Prior to that time it had been a very thin margin operation, and that its earnings were, in general, sufficient to provide everything that was necessary to refund any obligations that it might have maturing in 1940 either by virtue of the liquidation of the New Jersey Company or by virtue of the maturities at that time.

Mr. Clark: I am sorry that I have at this moment but one copy of this. Mr. Merriman has just drawn it up yesterday. I want to offer it in evidence, but I will supply other companies.

Mr. Welch: I think I would like Mr. Green to deal with the chart, if he will. I don't know that I should begin dealing with it, but it strikes me that the witness has tried to marry earnings to a pure statement of assets and liabilities, and I don't see how that marriage could be represented on this chart.

Mr. Clark: Well, he has stated, Your Honor, what he has done.

Mr. Welch: I don't understand it.

Mr. Clark: If it is erroneous, that can be brought out in cross-examination.

Mr. Welch: I can't bring out on cross-examination a device of something that I don't understand. I don't under-

stand marrying earnings to a chart of assets and liabilities. I am perfectly willing—

The Member: Well, that may be your misfortune.

Mr. Welch: I am willing that Your Honor should see the result that he has, and if it seems understandable and helpful to you I certainly won't object to it.

The Member: I do not find it understandable and helpful to me now in order to rule on the objection.

Mr. Clark: Well, I will offer it.

The Member: But from what has been said, I see no reason to exclude it. I will overrule the objection.

The Witness: Off the record, Your Honor.

(The witness made a remark off the record.)

The Member: Can't you say that for the record?

The Witness: Exactly what the blue line is has not been labeled. The blue line represents the net income over charges and expenses of the Chicago Stock Yards Company as taken from the Exhibit S-51 attached to the stipulation plotted on the scale of ten times that used for the plotting of the assets.

The Member: Now, let this be marked in evidence with the exception to the Petitioner.

The Clerk: Marked RRRR.

(The document so offered and received in evidence was marked "Respondent's Exhibit RRRR," and made a part of this record.)

Q. 122. (By Mr. Clark). Do you have any further testimony relative to this? A. No, sir.

Mr. Welch: Objection. Oh, O. K.

The Member: Well, I want to understand it, Mr. Clark, if you are through with it.

I mean, have you said everything you want to say about it?

Mr. Clark: Yes, sir.

The Member: Well, then, let me ask the witness one or two things to understand it. I am not sure that I do at all.

My first thought when I heard you on this subject, Mr. Merriman, was that I expected you to do with this exhibit No. 45 was to show how the blue columns should have been enlarged, the effect of which would have been to bring the tops of the blue columns closer to the tops of the red columns and thus to show the relation between the demands upon the company and the resources with which those demands could from year to year be met, which, as I understand it, was the theory upon which the chart No. 45 was designed to expound.

Now, was I correct in my expectation of what your change would disclose?

The Witness: Yes, sir; in part. However, I merely let that pass in my original statement by commenting on the fact that the title said that that was the resources to meet these requirements, and, in effect, it is the quick assets. They are resources in the form of quick assets that are available to meet those requirements. Now, that sort of a representation I think is perfectly proper. I think if one wanted to use the title that is used in that heading he should include all of the assets and not just the quick assets. But I think the earning power is the most vital single thing to look at in any corporation, because values of assets on the books may be great or small depending on whether they have greater or smaller earning power. At the time the Maine Corporation was formed and shortly thereafter, the company had a very small surplus over the fixed charges

of the parent and subsidiary companies as shown by that red line—the fixed charges on the total of that red line, I should say. And about 1920, '21, '22, they began to have a very substantial surplus over the fixed charges, so that that very surplus in and of itself, when you consider that there is added underneath that blue curve that I have put on the chart, the amount of the fixed charges to show what is available to meet the interest demands that would come about as a result of the debt and other obligations represented by the red column, you have a very imposing lot of earnings available to meet those charges, and, therefore, you would have no difficulty in refinancing.

The Member: Well, I will let the Petitioner clear that up.

Mr. Clark: You may cross-examine.

Mr. Welch: Shall I start my cross-examination?

The Member: If you will.

Perhaps there is just one question that I would like to get my own mind clear on before you start, and that is as to this term which you have used and which has also been used by others. What is the meaning as you have used it of the term "cash position"?

The Witness: I have used it in the sense of assets that are either cash or quickly realizable.

The Member: Well, now, what is your understanding of the fact as to what is meant as to this company, when you speak of its cash position? Did it have cash? Where was this so-called cash? What was the form of it?

The Witness: If I may have the exhibit, the exhibit that was introduced into evidence that is the foundation for this table, I can more quickly give you the answer.

There is the cash of the Maine Company, the Jersey Company, and of all the other subsidiary and affiliated companies. There are certain bonds and investments owned by these companies that have a ready market, and the totals of those companies are included, as I understand it, in the total of that blue column, together with the cash, and there may be certain other cash—certain other items which can be quickly turned into cash such as accounts receivable that are included in there. I believe they are included—there is a great deal to remember in this case, and I read the record about this this morning, and I am still not quite sure, but we have, taking the year 1933, we have the cash accounts receivable, notes receivable, Central Manufacturing District 5's, and other investments of the Maine Company, making a total of $13,903,000, in round figures.

The Member: Of which how much was cash?

The Witness: $7,645,000, and notes receivable were—

The Member: Well, I don't care about that. I want to get in my mind a clear conception aside from book figures and aside from just talk what this cash is. It isn't money in a sock, is it? It isn't cash? It isn't so many dollars in currency. Now what is it?

The Witness: I presume it is practically all cash in banks of deposit of the Maine Company and its subsidiaries, the cash that is taken in.

The Member: Well, you see, what I have in mind is this: If, let us say, in 1933, in February, you had cash in the till, that is one thing, but if you had cash on deposit with some of the banks of the United States it was one thing quite different than from what it was on deposit in other banks of the United States, because in March, 1933, there was a great deal of importance attached to which banks you had it in.

So the security—or, to get away from a technical word—the assurance of the usability from day to day, week to week, month to month, and year to year of a so-called cash position might have been different if its actual character or if the actual conception of cash position was one thing from what it would be if it were something else; and that is the reason I have been in sort of a fog when throughout this proceeding I have heard the words "cash position" just glibly used as if everybody understood it. Maybe it is my own lack of understanding that is at fault.

Now, can you tell me, in view of what I have said, as to what I am to understand concretely to be the real meaning of these words "cash position" as they appear in, well, let's say, your testimony, if that is different than what it is anywhere else.

The Witness: The only part of my testimony, Your Honor, that I remember particularly referring to cash position was in the comment with respect to the Maine Company, in which case I took the cash showing on the balance sheet of the end of the year, and the accounts—rather, notes receivable also appearing in the balance sheet of the end of the year, which were chiefly notes receivable from Mr. F. H. Prince & Company.

The Member: Did it make any difference to you whether this so-called cash position represented currency in physical possession or represented credits in the accounts with some banks and not others? Do you think that any of that mattered?

The Witness: Yes, sir; I think there is no question if you had cash in a bank that you were dubious about the solvency of, that the position would be different than if it were in a safe deposit vault or in a bank of unquestioned solvency.

The Member: What has been the question upon which your reasoning has proceeded as to what "cash position" meant? Have you always assumed that it was just the same as if it were in a safe deposit box?

The Witness: No, sir. I have been aware of the fact that the companies involved here at the end of certain of these years, not in 1933, but the end of 1932, had deposits which were—had certain deposits in banks which were not in a strong position.

The Member: So you have shaded the cash position into some imponderable extent by reason of the frailty of any one's deposit position at that time; have you?

The Witness: Well, I have not applied any discount factor against the cash of any given year to assume that there would be a tying up or a loss of a given amount of cash in that year, because the position of the company in all years seemed to me adequately strong to take care of any difficulties that arose from the known weakness of the one bank in which this company was particularly interested.

The Member: What bank was that?

The Witness: That was the Stock Yards National Bank, which was reorganized early in 1933.

The Member: Well, now, is that because you thought that the possible uncertainties of the cash position were not substantial, not serious, and that they could be treated as a negligible factor?

The Witness: I certainly wouldn't treat it as a negligible factor, Your Honor. I thought that the company's position as to assets and earnings in the face of the possible difficulties with respect to the cash that was held in this one bank was adequately strong to enable it to take care of difficulties. After all, one of the basic purposes of a surplus is to take care of rainy days, and, certainly, they come at times.

The Member: Well, that means that the elasticity in other factors was sufficiently great to overcome the elasticity in the cash factor; is that right?

The Witness: That is my opinion; yes, sir.

The Member: Well, that is all I want to get, what your—

The Witness: Yes, sir.

The Member: —mode of thought is about this.

The Witness: Yes, sir.

The Member: We will suspend now until 10 o'clock tomorrow morning, and, as I understand it, the cross-examination may then proceed?

Mr. Clark: Yes, sir.

The Member: You are through, Mr. Clark, are you not?

(Whereupon, at 4:40 o'clock p. m., February 6, 1939, the hearing in the above-entitled matter was adjourned.)

[Title omitted.]

SEVENTH DAY.

REPORTER'S MINUTES.

[Filed February 8, 1939.]

Hearing at Washington, D. C., on the 7th day of February, 1939, at 10 o'clock a.m.

The hearing in the above-entitled proceeding was resumed on this the 7th day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

The Member: You may proceed.

Mr. Clark: I am advised relative to Exhibits NNNN and OOOO, the first being the income tax return of the Chicago River and Indiana Railroad Company, and, second, the comparative balance sheets of the same for December 31, 1933, that a check of them has been accomplished, and they may now be admitted in evidence, in accordance with Your Honor's orders yesterday.

The Member: There is no objection, Mr. Welch?

Mr. Welch: There is none.

The Member: Very well. Let them be marked in evidence.

(The documents so offered and received in evidence, were marked "Respondent's Exhibits NNNN and OOOO," and made a part of this record.)

Mr. Clark: Will you take the stand, Mr. Merriman.

MR. NORMAN MERRIMAN

having heretofore been first duly sworn, was recalled to the stand, and was examined and testified as follows:

X-Q. 123. (By Mr. Clark). Mr. Merriman, at the beginning of your testimony yesterday you said that you lived in New Jersey. *A.* Yes, sir.

X-Q. 124. And in your quafifications you said something about doing something for a large group of important railroad companies in New Jersey. Do you remember? *A.* Yes, sir.

X-Q. 125. And I take it what you were doing for them has some connection with the tax situation in the State of New Jersey; is that right? *A.* That is correct, sir.

X-Q. 126. That is to say, they are now being taxed or threatened with a tax, with a personal property tax in New Jersey? *A.* No, sir. This—

X-Q. 127. Well, if the answer is "no," that is good enough. You know, do you not, that as a student of corporate matters, and as a resident of New Jersey, that New Jersey cities and towns are now asserting taxes against corporations having a domiciliary situs in those towns and cities? *A.* Yes, sir; that is correct.

X-Q. 128. And the City of Jersey City would be a sample, would it not? *A.* Yes, sir.

X-Q. 129. I would like to show you, Mr. Merriman, the original of an assessment against the New Jersey Company, and ask you to glance at it. Have you seen similar assessments on other companies? No doubt you have, in your position. *A.* I don't remember ever having seen the original assessment.

X-Q. 130. But you know this is going on, do you not? *A.* I know this type of assessment has been going on.

X-Q. 131. I call your attention to the paper which you

have before you, which is headed "The Chicago Junction Railways and Union Stock Yards Company, 15 Channing Place, Jersey City, N. J." That is the company that we have called the Jersey Company here. *A.* Yes, sir.

X-Q. 132. This begins, "You are hereby notified that the City of Jersey City has made written complaint to the Hudson County Board of Taxation that assessments of $31,988,802 for the year 1937, and $33,183,003 for the year 1938 be entered to the tax lists and duplicate of taxes in the District of the City of Jersey City, Hudson County, New Jersey, for the years 1937 and 1938, respectively, on the intangible personal property owned by the Chicago Junction Railways and Union Stock Yards Company." Do you observe that assessment of 33 millions in one year and 31 millions in another? *A.* Yes, sir.

X-Q. 133. Could you help us by telling us the approximate rate of taxation imposed by the City of Jersey City on these assessments? *A.* On the intangible personal property?

X-Q. 134. Yes. *A.* No, sir.

X-Q. 135. If I stated to you that it is $45 per thousand, would that seem unreasonable to you? *A.* On intangible personal property?

X-Q. 136. Yes. *A.* It would seem extraordinarily high to me, but I cannot—I have no knowledge on that point.

X-Q. 137. In any event, from your knowledge of the Jersey Company of the State of New Jersey, and of Jersey City, you will be quick to tell us that a company with a domiciliary situs in Jersey City is now facing personal property taxes, won't you? *A.* Substantial.

X-Q. 138. Substantial? *A.* Taxes; yes, sir.

X-Q. 139. And it follows, doesn't it, Mr. Merriman, that you get a further and quite cogent reason as to why it would be desirable to liquidate the Jersey Company in 1940? *A.*

Yes, sir; I believe it would be desirable to liquidate it in 1940.

X-Q. 140. Thanks for that. Now, early in your testimony you talked about canvassing the bond market for bid prices and asked prices on Jersey securities; do you remember? A. Yes, sir.

X-Q. 141. May I ask you whether or not in your study you came across the name of F. H. Prince & Company at any time? Just "yes" or "no." A. I did not; no, sir.

X-Q. 142. Did you learn that F. H. Prince & Company had steadily made bids for some of these securities about which you testified? A. Not through that study. That is in the record.

X-Q. 143. Did you learn it through some other source? A. Only through the record.

Mr. Welch: Without waiving my objection, if Your Honor please, to the admissibility of the opinion evidence as to whether or not the Maine Company is a holding company, which, I take it, I wouldn't in any event, but I want to be cautious—without waiving that objection, I wish to question the witness somewhat on that line of testimony.

X-Q. 144. (By Mr. Welch): Have you a copy of yesterday's record before you? A. No, sir; I have not seen yesterday's record at all.

Mr. Welch: I think it would be a convenience to the witness, and perhaps to me as well, if someone of my friends, if not my enemies, supplied him with a copy of the record to which I shall refer from time to time. Mr. Green, is there a second copy of our transcript in the room? And you have only one, Mr. Clark?

Mr. Clark: That is all, yes.

Mr. Welch: It follows—

The Member: Has the Clerk one?

The Clerk: No.

The Member: There should be one somewhere in the Board; that is, the original undoubtedly has been delivered to the proper officer of the Board, and, perhaps, if you are not going to need the Clerk for a minute, I will send him out to ask for it.

Mr. Welch: I think we will do much better if we have one.

The Member: You go after that, Mr. Ray.

X-Q. 145. (By Mr. Welch). Oh, Mr. Merriman, let me ask you this, too: Have you got before you all the papers you used in testifying yesterday? A. I just sent for some of them. I have certain of them. I thought I had them all and just discovered I didn't have them.

X-Q. 146. I shall want you to have them all, but I understand you sent for them? A. Yes, sir.

Mr. Welch: Now, if Your Honor please, I think I can go ahead on this point readily.

X-Q. 147. (By Mr. Welch). I call your attention, Mr. Merriman, to page 774 of yesterday's record, where you were testifying that in your opinion the Maine Company is a holding company, and I would like to ask you if you testified as follows:

"It is inconceivable to me that Mr. Prince, as president of the Maine Company, would give himself orders as president of the Jersey Company to transmit orders to the Union Stock Yards and Transit Company of which he was chairman of the board." A. Yes, sir.

X-Q. 148. You so testified? A. Yes.

X-Q. 149. And, I take it, you chose the word "inconceivable" with care; did you not? A. I believe so.

X-Q. 150. And this morning, as well as yesterday, it seems just inconceivable to you that the president of the Maine Company could order himself, let's say, as chairman

of the board of the Transit Company, to do something, and then do it; doesn't it? A. In the carrying out of ordinary—

X-Q. 151. Just "yes" or "no." It just seems inconceivable, does it not? A. It is certainly difficult to conceive.

X-Q. 152. Well, let me test you, if I may.

Let us suppose that Mr. Prince, as president of the Maine Company, writes a letter to the Transit Company and says: "Transit Company: Dear Sirs: I want you to move your bank account from the Stock Yards National Bank to the Drovers National Bank."

You can conceive him writing such a letter, can't you? A. Yes, sir.

X-Q. 153. And you can conceive of him sending it to Chicago, can't you? A. Yes.

X-Q. 154. Now, let us assume that a week later Mr. Prince went out to Chicago. That is easy, isn't it? A. Yes, sir.

X-Q. 155. And suppose he says to Mr. Leonard on arrival, "Have you changed that bank account?"

And Mr. Leonard said, "No. Sorry, Mr. Prince. We have all been sick out here, and we have not done it."

That is easy to conceive, isn't it? A. Yes, sir.

X-Q. 156. Now, suppose Mr. Prince then says, "Well, bring me the check book. I think I will do this myself," and he made out a check for the bank balance in the Stock Yards National paid over to the Drovers National.

That is conceivable, isn't it? A. Yes, sir.

X-Q. 157. Suppose he then walked over and made the new deposit. That is conceivable? A. Yes, sir.

X-Q. 158. Now, let me take you back to where Mr. Prince wrote the letter for the Maine Company. For whom would he be acting when he wrote the letter? A. If he wrote such a letter and signed it as president of the Maine Company, I presume he would be acting for the Maine Company.

X-Q. 159. Could you go with me far enough, omit the word "presume" and say he would be acting for the Maine Company? A. I think the line of distinction is very difficult to draw, the chairman of the board of the Chicago Stock Yards and Transit Company acting in the interest of the Stock Yards and Transit Company.

X-Q. 160. Yes. But suppose when he reaches into his desk and takes out a letterhead of the Maine Company and writes an order on it, have you any doubt that he is acting for the Maine Company when he writes that letter on that letterhead and signs it? A. Yes, sir; I would be inclined to doubt it.

X-Q. 161. You would doubt whether he was really acting for the Maine Company? A. He would have the letterheads in his desk, and he may write on that letterhead as a matter of convenience.

X-Q. 162. All right. Now, suppose he wrote this letter, suppose he took the letterhead of the Maine Company and said: "Dear Mr. Leonard: I have just been looking over the Maine Company situation, and we are short of money here. I want you promptly to declare a dividend." Would you say he was acting for the Maine Company when he wrote that letter, aimed to increase the bank balance of the Maine Company? A. Yes, sir. I would say he was acting for the Maine Company.

X-Q. 163. All right.

Now, let us suppose, on this line, that again he goes to Chicago in a week or two—would you do that for me? A. Yes, sir.

X-Q. 164. And when he gets out there he says, "Boys, did you declare that dividend that I, as president of the Maine Company, asked you for?"

And they said "No, Mr. Prince. We have all been sick, and we have not done it."

Can you assume that? A. Yes, sir.

X-Q. 165. Then, suppose Mr. Prince, as chairman of the board of the Transit Company, says, "I want a meeting right away. Bring me a notice, or a waiver of notice, of a directors' meeting. I am going to sign it and call a meeting."

Will you assume that with me? A. Yes, sir.

X-Q. 166. Now, when he gives that notice out, or that waiver, and signs it, would you say he was acting for the Transit Company? A. Necessarily, as chairman of the board of—as director of the Transit Company he would be acting for the Transit Company.

X-Q. 167. Yes. Then they go ahead and declare the dividend. You will assume that? A. Yes.

X-Q. 168. Now, haven't you got a situation there where the Maine Company had ordered the Transit Company to do something? A. Yes, sir.

X-Q. 169. Mr. Prince ordering them? A. Yes, sir.

X-Q. 170. Haven't you, two weeks later, when Mr. Prince is out there and signs the waiver and calls the meeting—haven't you got Mr. Prince, as chairman of the board of the Transit Company, carrying out an order from the Maine Company? A. Under those circumstances, I think that is correct.

X-Q. 171. Now, that being true, would you like to reconsider that strong word of yours, "it is inconceivable to me that Mr. Prince, as an officer of the Maine Company, could give himself an order as an officer of the Transit Company"? A. I would modify that to say it would be difficult to conceive all that being the usual business procedure.

X-Q. 172. But, Mr. Merriman, under a little guidance from me, it is quite easy this morning to conceive that, isn't it? A. It would be quite unusual circumstances.

X-Q. 173. Not extraordinarily so, changing one bank ac-

count from one bank to another, or demanding a dividend? Not extraordinary, is it? A. It is not extraordinary at all that the company should consider changing a bank account or declaring a dividend. That is the normal function of the chairman of the board, as chief executive officer of the Union Stock Yards and Transit Company.

X-Q. 174. I think perhaps I have dealt enough for the moment on that. Let us turn to another thing.

You, of course, have read Mr. Leonard's testimony? A. Yes, sir.

X-Q. 175. Did you read that portion of it where he told how he wanted $2,000,000 worth of new concrete hog houses and asked Mr. Prince for them? A. Yes, sir.

X-Q. 176. Now, if you remember, Mr. Prince said "no"; don't you? A. Yes, sir.

X-Q. 177. Now, he had asked Mr. Prince for money from the Maine Company; do you remember? A. Yes, sir.

X-Q. 178. And it was in 1933? A. I don't remember the date.

X-Q. 179. Now, I would like you just to glance at the balance sheet of the Transit Company for 1933—oh, you have a copy of the stipulation. Look at it. A. Balance sheet of the Transit Company?

X-Q. 180. S-4, page 6.

Are you looking at it, Mr. Merriman? A. Yes, sir.

X-Q. 181. Now, it is clear from that balance sheet, S-4, page 6, that in 1933 the Transit Company was in no position to spend $2,000,000 for hog houses, was it? A. It did not have those free cash resources; no, sir.

X-Q. 182. So when Mr. Leonard asks Mr. Prince for $2,000,000 to build hog houses he is clearly asking him that as president of the Maine Company? A. Yes, sir.

X-Q. 183. Because the Maine Company in that very year

has plenty to build hog houses, if it has not a more cogent need for it. A. Yes, sir.

X-Q. 184. Now, is it inconceivable to you that when Mr. Prince says "no" to the hog houses, he is saying "no" to the Transit Company, of which he is chairman? A. Yes, sir.

X-Q. 185. That is inconceivable to you? A. No. I say it is conceivable to me.

X-Q. 186. It is quite conceivable. A. Yes, sir.

X-Q. 187. Now, let us take up the bank crisis in 1932 and 1933. You have studied that, no doubt, haven't you? A. Yes.

X-Q. 188. Could I ask you, Mr. Merriman, if that bank crisis looms with you as a somewhat important event in this whole case? A. Yes, sir; I think the banking situation between 1931 and 1933 is a very important matter.

X-Q. 189. Now, you remember the testimony is that Mr. Prince and Mr. McDonough, of the Maine Company, were very active in that whole matter? A. Yes, sir.

X-Q. 190. And that the Maine Company told the Transit Company how much to put up? A. (No answer.)

X-Q. 191. Oh, you must know that, if you studied it. A. I remember that the—I remember the amounts that were put up respectively by the various companies.

X-Q. 192. And don't you remember the testimony that it was the Maine Company that decided what the amounts were? A. Yes, sir.

X-Q. 193. Yes. The Maine Company told the Transit Company what to do, didn't it? A. Yes, sir.

X-Q. 194. And it told the Produce Terminal what to do? A. Yes, sir.

X-Q. 195. And Central Manufacturing District, didn't it? A. As well as I remember the testimony; yes, sir.

X-Q. 196. Now, there is no doubt in your mind, is there,

that when Mr. Prince told those companies what to do he was acting on behalf of the Maine Company, is there? A. I still find it difficult to disassociate the personality of Mr. Prince as the chairman of the Transit Company and president of the Maine Company.

X-Q. 197. And it is because you have that difficulty that I am pursuing this line, hoping that I can in some way clear that difficulty with you, because I think you have created a difficulty that you need not have created, Mr. Merriman.

Now, let us consider once more: There isn't any difficulty about the proposition that when the Maine Company tells the operating companies how much to put up and how it is to be subordinated, on what level, there is no difficulty about the fact that Mr. Prince is acting for the Maine Company when he makes those decisions, is there? A. No, sir.

X-Q. 198. All right. Thank you. After Mr. Prince and Mr. McDonough made the decisions on the part of the Maine Company as to what the operating companies were to do, you remember that subordination agreements were signed: don't you? A. Yes, sir.

X-Q. 199. Now, let's assume—I think it is a fact—but let's assume that those subordination agreements were signed by Mr. Prince. They could have been, readily, couldn't they? A. Yes, sir.

X-Q. 200. When he sat down with a pen to sign a subordination agreement, which subordinated the deposits, let's say, of the Transit Company, and he held the pen in his hand, have you any doubt that he signed it acting for the Transit Company? A. No, sir.

X-Q. 201. None whatever? A. (Witness shakes head negatively.)

X-Q. 202. Just one other test, if I may:

You remember the New York Central lease, Mr. Merriman? A. Yes, sir.

X-Q. 203. That was negotiated entirely by Mr. Prince, so the testimony shows. Have you read that? A. I have read that testimony.

X-Q. 204. Yes. A. I—

X-Q. 205. And the lease— A. I don't remember that particular point.

X-Q. 206. Well, assume, if you will, that that is the testimony. That lease was signed some time prior to 1922, was it not, or in '22? A. It was signed in May of 1922, I think.

X-Q. 207. O. K. A. The agreement—

X-Q. 208. That is about right. A. —carried back earlier subject to approval of the Interstate Commerce Commission.

X-Q. 209. Have you any doubt that when Mr. Prince was negotiating that lease, he was acting on behalf of the Maine Company? A. I think when he signed the lease, he must have acted in his corporate capacity as chief executive officer of the Railway Company.

X-Q. 210. But, Mr. Merriman, he was no officer of the Railway Company in that year. Do you know that, sir? A. I do not know that, and I do not remember who signed the lease.

X-Q. 211. Neither do I, but I do remember that Mr. Prince didn't go on the Railway board until 1926. Didn't you notice that as you went through the testimony? A. No, sir; I did not.

X-Q. 212. Assuming that Mr. Prince did not go on the Railway board until 1926, then there can be no doubt that in negotiating that lease he acted for the Maine Company, can there? A. In negotiating the lease he would undoubtedly act for the Maine Company.

X-Q. 213. I assume that in preparing yourself to testify that the Maine Company is a holding company you sought

every possible avenue of information, didn't you? A. I certainly endeavored to find everything that I could that had a bearing on the subject.

X-Q. 214. In your search did you come across the book that I hold before you headed "Before the Secretary of Agriculture, Bureau of Animal Industry, Docket No. 472, Secretary of Agriculture v. Union Stock Yards and Transit Company of Chicago"? A. What is the date of that?

Mr. Welch: Help, Mr. Green.

Mr. Green: I think I can find it for you. It is about July, 1938.

(There was a discussion off the record.)

A. Yes, sir; I have seen that report and read a copy. I obtained it from the files of the Department of Agriculture, which was not a printed copy; it was a typewritten copy.

X-Q. 215. (By Mr. Welch). And you considered that report among other things in forming your opinion that the Maine Company is a holding company.

(Pause.)

X-Q. 216. Why do you hesitate? You didn't read it for fun, did you? A. I read it for the purpose of finding out the nature of the operations and the income of the Union Stock Yards and Transit Company.

X-Q. 217. Precisely. A. And the value of its properties as ascertained by the Examiner in this case. I do not know that I read it from the standpoint of the inquiry as to whether this was a holding company or not.

X-Q. 218. But you read it? A. Certainly.

X-Q. 219. You told us. A. I read it. I read it to obtain whatever information there was that had—bore light on this subject.

X-Q. 220. And you read it, of course, with a view to preparing yourself to testify here? A. Yes, sir.

X-Q. 221. Now, let's read together something in it that I

find of interest, and I am reading from page 24 of Docket No. 472 before the Secretary of Agriculture, paragraph numbered 44.

"The financial history of the Respondent as it relates first to the New Jersey Company and later to the Maine Company leads to the conclusion that the Respondent in this proceeding is in effect owned, operated, and managed by the Maine Company."

Now, you read that, didn't you? A. Yes, sir.

X-Q. 222. And you knew that was a finding in the hearing before the Secretary of Agriculture? A. Yes, sir.

X-Q. 223. And you, of course, knew that the word "Respondent" referred to the Union Stock Yards and Transit Company. A. Yes, sir.

X-Q. 224. Did you consider that finding carefully when you formed your opinion that the Maine Company was a holding company wholly?

Mr. Clark: If Your Honor please—

The Member: Have you finished?

Mr. Welch: Yes.

Mr. Clark: This seems to me wholly immaterial. This is a proceeding before the Department of Agriculture. It has no bearing on this case. There is no evidence as to the facts that were presented there, and it doesn't seem to me that it is proper cross-examination, although I don't like to interfere with cross-examination.

The Member: That is an objection, I take it?

Mr. Clark: Yes, sir.

The Member: It is overruled.

Mr. Welch: Will you read the question?

(Question read.)

A. The answer is "Yes."

X-Q. 225. (By Mr. Welch). The answer is "Yes."

Did you form the opinion that the Maine Company is a

holding company and nothing else before you read this sentence on page 24 of this report, or afterward? A. I have not testified that the Maine Company was a holding company and nothing else.

X-Q. 226. Ah! A. As I remember, my testimony of yesterday—

X-Q. 227. Then I think we will have no quarrel, sir. You think that the Maine Company is something other than just a holding company, don't you? A. I stated in my testimony yesterday, and endeavored to be clear about it, that the Maine Company undertook certain financial operations for the benefit of its subsidiary and affiliated companies, since it had become the repository of nearly all of the surplus cash of those companies.

X-Q. 228. Well, I would like it just concisely because some day I might want to point it, and will you give it to me concisely in "yes" or "no"?

After your study, you have formed the opinion that the Maine Company is something in addition to being just a holding company? "Yes" or "no." A. No.

X-Q. 229. Now, have you gone back on me? Are you going to tell me— A. No, sir.

X-Q. 230. Are you going to tell me now that it is a holding company and nothing else? A. Would you define a holding company for me, please?

X-Q. 231. Well, you see, you were—would you like for me to give you my conception of a holding company? A. Yes, sir.

X-Q. 232. If I form a corporation today and put into it, let us say, a thousand shares of United States Steel with which company I have nothing whatever to do except to hope I will get dividends and collect them, if I do, I should say that that was a holding company and nothing else.

Would you agree with me? A. Yes, sir.

X-Q. 233. And have I given a fair definition of a holding company? A. Of a company that is solely and entirely a holding company and exercises no functions of any character with respect to an enterprise.

X-Q. 234. Yes. So you will now say to me, will you not, that the Maine Company is not solely and entirely a holding company? A. Yes, sir; I insist that it is solely and entirely a holding company.

X-Q. 235. Solely and entirely? A. I do not know that it conducts any business operations except in connection with its holdings, and my opinion is that that is something that is within the function of a holding company.

X-Q. 236. Well, haven't you read all of the testimony about how the hand of the Maine Company rests on these operating companies steadily day by day? A. Yes, sir.

X-Q. 237. How they are on the telephone sometimes two or three times a day? You have read that, haven't you? A. Yes, sir.

X-Q. 238. How reports of what they are going to do—strike that out.

How reports of what they have done must be sent in regularly to the Maine Company? A. Yes, sir.

X-Q. 239. How the Maine Company vetoes some things that the operating company wants to do? A. Yes, sir.

X-Q. 240. And how the Maine Company gives the green light saying "Go ahead" on other things that the operating company wants to do? A. Yes, sir.

X-Q. 241. How the Maine Company selects the bank depositories for the operating companies? A. Yes, sir.

X-Q. 242. How the Maine Company dictates their boards of directors? A. Yes, sir.

X-Q. 243. How the Maine Company tells them when to declare dividends? Have you noticed that? A. I do not remember that in the testimony.

X-Q. 244. How the Maine Company picks key men for the operating companies? A. I don't remember that in the testimony. It may be.

X-Q. 245. Assume that it is in the testimony, will you? A. Yes.

X-Q. 246. When I call all of those things to your mind, you still prefer to say to His Honor that the Maine Company is solely a holding company? A. Yes, sir.

X-Q. 247. You do? A. Yes, sir.

X-Q. 248. Now, have your papers come down? A. Yes, sir.

X-Q. 249. That you sent for?

Has anybody found a copy of the record yet?

Mr. Pierson: He has one.

The Member: You have the copy of the record before you?

The Witness: Yes, sir.

The Member: For yesterday's proceedings?

X-Q. 250. (By Mr. Welch). Would you turn to page 779 of the record with me, Mr. Merriman? A. Yes, sir.

The Member: If you have another copy, let the Clerk get the copy from the witness, and then let the witness borrow another copy from somewhere else, will you please?

X-Q. 251. Will you turn to page 779, please, Mr. Merriman? A. Yes, sir.

X-Q. 252. At the top of that page, your answer begins: "Yes, sir," I think I had better pick up a word or two on page 778.

"The record of income of the Maine Company shows that continuously for a considerable number of years it accumulated surplus," and then I go ahead at the top: "accumulated a large surplus which was used as a possible financial reservoir for the emergency needs of the subsidiary and affiliated companies on certain occasions in between '30 and

'33, but which was used regularly as a source of financing the chief stockholder of the company."

You observe those words? A. Yes, sir.

X-Q. 253. "Was used regularly as a source of financing the chief stockholder of the company."

Now, I would like it if you would show me your notes from which you testified when you told us that; would you, please, sir? A. I had no particular notes in front of me to make that testimony. I have the balance sheets, income accounts, the material in the stipulation with respect—and the material in the record with respect to the financing that was done by the Maine Company in connection with the bank difficulties in the latter years of this period, and the record of loans made to F. H. Prince or F. H. Prince & Company which appear in the exhibits attached to the stipulation.

X-Q. 254. You had also, no doubt, the evidence in respect to the loans that was introduced by the Petitioner? A. Yes, sir.

X-Q. 255. Would you be good enough to tell me, Mr. Merriman, the names of the witnesses whose evidence about these loans you considered significant? A. The most significant—

X-Q. 256. I didn't ask you for the most. Just the names of the witnesses whose evidence about these loans seemed to you significant. A. I would say the evidence of Mr. Donovan primarily. I am not certain whether Mr. McDonough testified about those loans, and the exhibit attached to the stipulation shows the schedule of those loans from year to year.

X-Q. 257. Any other witness? A. At the moment I don't remember any other.

X-Q. 258. Well, now, Mr. Merriman, I will tell you why I am questioning you about this. I was surprised at your us-

ing the words "which was used regularly as a source of financing the chief stockholder."

Will you center your attention for a moment on those words "used regularly as a source of financing the chief stockholder"? A. Yes, sir.

X-Q. 259. By the word "regularly," do you mean from year to year, Mr. Merriman? A. I think the record shows that it was done for nearly every year during the last seven or eight years, ending in 1933.

X-Q. 260. Have you finished that answer? A. I am trying to locate the exhibit attached to the stipulation, which shows the total amount of the loans from the Maine Corporation to F. H. Prince and F. H. Prince & Company.

X-Q. 261. I will locate that for you in a moment. A. And I have notes on the balance sheets as the amount—the notes receivable that were due from F. H. Prince and F. H. Prince & Company during '29 and '30, '31, and '32, and '33, and they show a reasonably consistent growth.

X-Q. 262. A reasonably consistent growth? Is that the stand you now take, Mr. Merriman? A. Yes, sir.

X-Q. 263. And by that you mean that as each year succeeded the prior one, the loans were larger? A. That was the trend of them.

X-Q. 264. That was the trend? A. Yes, sir.

X-Q. 265. Now, look at S-65 a moment, will you? Have you it before you? A. Yes, sir.

X-Q. 266. Does that show the loans? We have the right exhibit, haven't we? A. Yes, sir.

X-Q. 267. You just told us that they show a steadily increasing trend from year to year. Tell us, if you will, the trend from 1929 to the year 1930. A. There was a decrease in the cash from 1929 to 1930 amounting to approximately half a million dollars.

X-Q. 268. That is to say, that in the year 1930 Mr. Prince

and F. H. Prince & Company repaid to the Maine Company in excess of half a million dollars; did they not? A. Yes, sir; that is correct.

X-Q. 269. So it is entirely incorrect to say that these loans had a steady increase from year to year, isn't it? A. No, sir; it is not; from 1922 to 1933.

X-Q. 270. You have answered it. A. This schedule—

X-Q. 271. "No, it is not." A. ——shows—

X-Q. 272. Just a moment.

Mr. Welch: Your Honor please, the answer is "No, it is not." I think the occasion calls for no further explanation. He can be taken on redirect.

Mr. Clark: I think, Your Honor, he is entitled to complete the answer to the question.

The Member: I will let him complete his answer.

Mr. Welch: The only thing is—

The Member: Now, don't do it at length.

A. In 1922 to 1933, the only year in which there was a decrease in the amount of cash owed by F. H. Prince and F. H. Prince & Company to the Maine Company was the year 1930.

X-Q. 273. 1930? A. The loans increased from $42,000 in 1922, in round figures, to $4,848,000 in 1933.

X-Q. 274. Now, that we all know.

Now, 1930 happens to be the first year that we have in issue, isn't it? A. Yes, sir.

X-Q. 275. So we start our lawsuit here with a year in which those loans decreased by more than half a million dollars; do we not? A. Yes, sir.

X-Q. 276. And that, by the way, is the first year when our now famous depression was beginning to be felt, wasn't it? A. Yes, sir.

X-Q. 277. Now, I want to call your attention to another part of that answer—of that sentence "which was used regu-

larly." I dealt with that for the moment. "As a source of financing the chief stockholder of the company."

Now, have you learned from the testimony what was actually done with the money that was borrowed from the Maine Company by F. H. Prince or F. H. Prince & Company?" A. I have read the record in that respect.

X-Q. 278. Let me call your attention, if I may, to the purchase of Armour stock in 1933. You are familiar with that? A. Yes, sir.

X-Q. 279. Did you study Mr. Leonard's testimony in which he said in substance that that purchase had been a great help to the Maine Company? A. Yes, sir.

X-Q. 280. One million dollars was loaned by the Maine Company to F. H. Prince & Company to effect that purchase, wasn't it? I mean, that is the testimony? A. That is my recollection of the tenor of the testimony.

X-Q. 281. Now, I think you testified—I am going to another point in your testimony—will you look at page 791? A. Yes, sir.

X-Q. 282. Look at the last three lines on the page, which I will read to you: "And I think that dividends to its stockholders would be a more logical policy than loans to stockholders that bore substantially less interest than could be obtained by the retirement of the company's own securities." A. Yes, sir.

X-Q. 283. Now, let's take this Armour purchase, and the testimony as it stands. Is it your opinion that the Maine Company would have been better served by a declaration of an additional dividend of a million dollars to Mr. Prince in the year '33 than it was served by a loan to F. H. Prince & Company used to buy Armour Company stock? A. I do not think it possible to answer that hypothetical question. It has not sufficient number of elements in it.

X-Q. 284. Well, let us see if it does not.

Mr. Welch: Could I have it read?

(Last question read.)

Mr. Welch: Now, the witness' position is, Your Honor, that he should not be required to answer.

The Member: Well, what is the question that the witness is being asked now?

Mr. Welch: I just had it read.

The Member: You will have to tell me exactly what the situation is. Has the witness refused to answer?

The Witness: I said I thought the question did not have enough elements in it to enable me to give an answer. It was a hypothetical question without sufficient elements in it to enable me to answer.

X-Q. 285. (By Mr. Welch). You see, one advantage the cross-examiner has is that he can put in hypothetical questions just what he likes and have you tell him what your opinion is, and I want to test you by that question with just what it has in it.

Mr. Clark: The witness says he cannot answer.

The Member: You say you cannot answer that question; is that correct?

The Witness: I say it does not have sufficient elements in it. It is a hypothetical question without sufficient elements in it to enable me to answer, to base an opinion on it.

The Member: I think you will have to carry him along and ask him questions.

X-Q. 286. (By Mr. Welch). Let us assume, Mr. Merriman, that in the year 1933 Mr. Prince, as director of the Maine Company, thought it would be to the advantage of the Maine Company if he owned a million dollar block of stock in Armour & Company. Will you assume that? *A.* Yes, sir.

X-Q. 287. Let us assume that he in that year acquired the million dollar block. Will you assume that? *A.* Yes, sir.

X-Q. 288. Let us assume that as a consequence Mr. Prince went on the board of Armour & Company. *A.* Yes, sir.

X-Q. 289. And let us assume that Mr. Leonard has testified that the income of the Transit Company, and hence the Maine Company, has been increased by about a quarter of a million dollars per year as a consequence of that purchase of Armour stock. Will you assume that? *A.* You are asking me to assume that?

X-Q. 290. Yes. *A.* That is not in the record. It is a condition contrary to fact. Mr. Leonard did not testify to that.

X-Q. 291. Let us assume, then, that in substance Mr. Leonard testified that the purchase of the Armour stock had had a beneficial interest on the Transit Company, and therefore on the Maine Company. Will you make that assumption? *A.* Yes, sir.

X-Q. 292. Let us assume that to make the purchase possible the Maine Company lent $1,000,000 to F. H. Prince & Company. Will you assume that? *A.* Yes; sir.

X-Q. 293. Now, here is my question:

On all of these assumptions that I have put to you, is it your opinion that the Maine Company would have been better served in 1933 had it declared any dividends to Mr. Prince in the sum of $1,000,000 than it was served by making the loan to purchase Armour stock? *A.* On the assumption that the Maine Company would make the loan to Mr. Prince for the purpose of buying that stock and using it in the fashion in which he did, that they would set it up as a requirement for the loan, I think it would be better than declaring a dividend, which he would be free to use in any fashion.

X-Q. 294. And using that, then, simply as a typical transaction, in so far as the loans to F. H. Prince or F. H. Prince & Company were made to serve some interest of the Maine Company, is it your opinion that the Maine Company is bet-

ter off on making the loans than it would be on declaring a dividend? A. Yes, sir; on that assumption.

X-Q. 295. That is all I want.

Mr. Clark: Did the Reporter get the "yes, sir on that assumption"?

The Reporter: Yes.

The Member: He has got it. It is all clear.

X-Q. 296. (By Mr. Welch). Incidentally, while we are dealing with these loans, I want to ask you whether or not in your opinion the common stock of the Maine Company is clearly worth its book value. A. I have made no analysis of the common stock of the Maine Company to determine the asset value of that stock. It is my opinion, from the studies that I have made, that it is probably worth substantially in excess of its book value.

X-Q. 297. You would have no difficulty in saying that it is worth at least its book value, would you? A. No, sir; I would not.

X-Q. 298. Oh, by the way, did you hear or read Mr. Prince's testimony to the effect that he did borrow $160,000 as a temporary loan for personal use to buy his present home until such time as he could sell Princemere, his old home? Did you read that testimony? A. Yes, sir.

The Member: Mr. Welch, I want to go back to that book value. I do not understand that question. Common stock on the books of the corporation issuing it does not have book value at all. Here you are talking about book value—

Mr. Welch: Well—

The Member: I only wanted to be clear. I can surmise the meaning, but I want the record to be clear on what you mean.

Mr. Welch: In using the words "book value" of the Maine Company, I did not mean the value at which that stock was taken on its books; I meant the value of the stock when you

consider its assets and its liabilities as shown on its balance sheets and such apparent value per share of the stock of the Maine Company.

The Member: You see, the net worth is on the liability side as capital stock.

Mr. Welch: Yes.

The Member: Is that what the book value is?

Mr. Welch: Yes.

The Member: That is the way you understood it, and that is the way you used it, Mr. Merriman?

The Witness: That is the way I used it.

The Member: All right.

Mr. Welch: Would you read that last question to me?

Oh, I remember what it was. I will strike out the last question.

X-Q. 299. (By Mr. Welch). You heard Mr. Prince's testimony, Mr. Merriman, that he did on one occasion borrow for his own personal use, and that was the occasion that he borrowed $160,000 from the Maine Company to buy a house in Newport, the loan being temporary in character, until such time as he could sell Princemere, his old home? Did you read that testimony? A. I read that testimony.

X-Q. 300. Now, you would say, would you not, Mr. Merriman, from your study of the large figures involved in this case, that a sum of as little as $160,000 is scarcely significant enough to determine the destiny of this case?

Mr. Clark: Let me hear the question, please Mr. Reporter.

(Last question read.)

Mr. Clark: Oh, I object to it.

Mr. Welch: Strike it out.

X-Q. 301. (By Mr. Welch). From your study of the figures involved in this case, at no place in it does the sum of $160,000 ever become very significant, does it? A. Not to me, sir.

X-Q. 302. Now, I want to turn, if I may, to this—there is an Exhibit RRRR, which is the chart, the small copy—

The Member: That is the one Mr. Clark has been using.

Mr. Clark: Has that duplication been made?

The Witness: Mr. King has one copy.

Mr. King: That is news to me. When did I get it?

Mr. Clark: Do you have a copy before you?

The Witness: No, sir.

Mr. Clark: Has the exhibit been returned to the Board?

The Member: Mr. Welch has the original exhibit before him now.

Mr. Clark: Has a copy been delivered to the Petitioner?

There is another copy, is there not, Mr. King?

It is to be photostated, Your Honor.

The Member: Well, photostating would not do with an exhibit like that. You have an exhibit with two colors on the original, and this witness has put another color on it. Of course, you cannot do that with a photostat.

Mr. Clark: Well, Mr. Merriman, won't you draft another one of those? I do not mean at the moment necessarily. There is another copy here which—

Mr. Welch: Is that a duplicate?

Mr. Clark: Yes, it is.

I think Mr. Merriman can use this.

Mr. Welch: Yes, let him have that, and I will hold the one I have.

Is it possible for Your Honor to see this?

The Member: I can see perfectly well.

X-Q. 303. (By Mr. Welch). Now, let me see, Mr. Merriman, if I can determine what you have done. You have, I believe made some dots on this chart from year to year, which dots you placed by reference to S-51; is that right?

A. Yes, sir; that is correct.

X-Q. 304. And you have taken the column "Net Income" S-51 and made a dot each to represent it, or to fix it on the columns, and then have drawn a connecting line between all those dots; have you not? A. Yes, sir.

X-Q. 305. And you have used a scale ten times that of the scale on which the chart was originally constructed? A. Yes, sir.

X-Q. 306. Did it seem to you that it would be helpful to us all to have a chart with two different scales, Mr. Merriman? A. Yes, sir. It is a very common practice with this kind of chart.

X-Q. 307. A very common practice.

Now, the consequence of what you have done is that you have a rise of the net earnings after 1922, do you not? A. Yes, sir. After 1920 the rise becomes apparent.

X-Q. 308. Yes, but really it goes quite beautifully from 1922 on, does it? A. Yes, sir.

X-Q. 309. You know, do you not, the secret of that rise? A. Oh, yes.

X-Q. 310. And what was it? A. The most important factor in that rise was the lease from the River Road—the Railway Company's property by the Chicago River and Indiana.

X-Q. 311. Quite right.

Now, may I ask you whether or not on Exhibit 45 the results of that lease are in turn registered in the blue columns? A. Yes, sir.

X-Q. 312. So that the blue columns certainly show a delightful result from increased earnings, do they not? A. From the application of those increased earnings to additional cash resources and investments.

X-Q. 313. Right. And in so far as net income was swelled after 1922 by the new lease and less than that disbursed to stockholders in the form of dividends, just by that amount

does the blue column rise on that Exhibit S-45; does it not? A. Yes, sir.

X-Q. 314. Now, if I understand you correctly, you think Exhibit S-45 is correct mechanically, do you not? A. Yes, sir; I am quite sure of it.

X-Q. 315. Yes. And— A. Except for the fact that the red columns are stated to represent the resources to meet those requirements which I—

The Member: Just a minute. You mean the blue columns, don't you—

The Witness: Yes, sir.

The Member: —to represent the resources?

The Witness: I meant the blue columns are stated to represent the resources to meet those requirements, whereas they merely represent what might be termed the quick assets available to meet such requirements.

X-Q. 316. (By Mr. Welch). Yes. We fully understand each other, and I am sure His Honor understands us both.

You feel there is another chart which had fixed assets somewheres up along the blue column, do you not? A. Above the blue column.

X-Q. 317. Above the blue column. A. Yes.

X-Q. 318. Let us say a light blue representing fixed assets? A. Yes, sir.

X-Q. 319. Well, now, since you would be happier if fixed assets appeared on the chart, is that because this company ought to do some refunding in 1940 instead of paying its debts? A. I think refunding is logical for an enterprise of this character.

X-Q. 320. Now, let me put it to you the other way:

Let us take the years from 1930 to 1933, which we are considering, Mr. Merriman: It would not have been unreasonable for the Maine Company to plan to preserve this enterprise intact and to enjoy its earnings after 1940, would

it? A. I would expect that that would be reasonable, to preserve this enterprise.

X-Q. 321. You would think it was eminently reasonable for the directors of this company in 1930 to 1933 to plan to own the enterprise intact and enjoy its earnings after 1940, would you not? A. Certainly.

X-Q. 322. Now, that plan should involve in some way a discharge of the liens ahead of the Maine Company's ownership, or else substitute a new lease, should it not? A. One or the other.

X-Q. 323. Now, either plan could be adopted, couldn't it, the elimination of liens or the substitution of new ones in whole or in part? A. Yes, sir.

X-Q. 324. Now, if I understand you— A. There is a third plan that could be adopted, and that is to sell the Railway property, since that is a fixed income bearing investment.

X-Q. 325. Oh, but, Mr. Merriman, you just told us that any one in his right senses would want to preserve the enterprise intact after 1940. A. The major elements of the enterprise that contribute to increase the earnings, the possibility of increasing earnings, it is not possible for Chicago Stock Yards Company to increase the earnings from that lease, and that is a fixed investment, just as if they had a certain amount of money in very high grade bonds.

Mr. Welch: I certainly owe Your Honor an apology. I simply was not following.

May I have the answer read.

(Last answer read.)

X-Q. 326. (By Mr. Welch). Well, I thought you told us yesterday—I think you told us yesterday, on page 846 of your testimony, that—I will wait until you find it. A. Yes, sir. I have it.

X-Q. 327. In about the middle of your answer you said:

"Beginning about 1922 this enterprise became a strong enterprise. Prior to that time it had been a very thin margin operation."

Do you notice those words? A. Yes, sir.

X-Q. 328. Now, the secret of the change from a thin margin operation to a strong margin operation is the Railway lease, isn't it? A. Yes, sir.

X-Q. 329. Now, you do not want to tell His Honor that the Maine Company might dispose of the Railway lease and go back to the thin margin operation, do you? A. Oh, it would no longer be a thin margin operation if it disposed of the Railway lease. The Company clearly contemplated the probability of the disposal of the Chicago Junction Railway Company property, because there is an option in the lease, Petitioner's Exhibit No. 2, which provides for the sale of that property at 33 millions of dollars, and if they had 33 millions of dollars from the sale of that lease they could pay off all the amounts in the red columns and have a very substantial surplus left over.

X-Q. 330. Right. A. So that it would no longer be a thin margin operation.

X-Q. 331. Now, do you know anything about the attitude that the I. C. C. has taken about that 33 million dollar option? A. I have read all of the decisions of the I. C. C. in connection therewith.

X-Q. 332. Tell His Honor what stand the I. C. C. has taken with respect to the option. A. The I. C. C. has in its decision of 1928, in effect, as I interpret the decision, voided the option.

X-Q. 333. Right.

Now, as you went through your testimony yesterday, didn't you have the feeling that the Railway Company was, to use stock yards' terms, almost the prize bull of this show? A. From an investment standpoint, it is certainly the prize

bull. From the standpoint of increasing the income, it is not good at all. The income cannot, so far as I know, be increased in any way whatsoever under the terms of that lease; whereas, the income of the other elements of the property can, assuming good business conditions and good management, perhaps be worked up considerably over a period of years.

X-Q. 334. Now, in any event, you will agree with me that the managers of the Maine Company would be far from unreasonable in saying that they wanted to go on with their end of the Railway Company lease, would you? *A.* It would be a question of what they could get for it, whether they preferred to hold approximately 30 million dollars of value in the form of that particular security, or whether they preferred to diversify their investments.

X-Q. 335. Yes. I am only saying to you that if you heard the board of directors saying that they wanted to keep that lovely source of income, you would not quarrel with them as being silly or unreasonable, would you? *A.* There would be nothing unreasonable about it at all, or the determination to make the company an investment company which had a large share of its assets invested in a fixed interest-bearing security.

X-Q. 336. All right.

Now, let us assume, Mr. Merriman, that we are the board of directors of this company in 1930 and 1933, and we are looking forward to what we are going to do in 1940. You have already told me clearly that the Jersey Company ought to be liquidated.

A. I think it could be advantageous. I do not think it is essential at all.

X-Q. 337. But you think that good business judgment would be to liquidate it; do you not? *A.* Yes, sir.

X-Q. 338. And the consequence is that you and I both

agree that bonds have got to be paid off; that is 14 millions? A. Yes, sir.

X Q. 339. And, say, four or five millions of guaranteed bonds have got to be dealt with in some way. A. Yes, sir.

X Q. 340. And we know that this preferred stock has got to be paid, and that is about 6½ million dollars. A. Yes.

X Q. 341. And we know that the rest of the common stock that they have not yet succeeded in getting has got to be dealt with in some way. A. Yes, sir.

X Q. 342. Now, in any man's language, that is a large program, is it not? A. It is a substantial refinancing program; yes, sir.

X Q. 343. Now, as I understand you, if you sat in the seats of the directors in the years 1930 to 1933, you would have preferred to look forward to refinancing as against accumulating money to pay off the liens; is that right? A. I would

Mr. Welch: I believe that could be answered "yes" or "no." I would like it to be. I think it is fair.

Mr. Clark: Let the witness answer.

The Witness: May I have the question?

Mr. Welch: I see he is taking a deep breath.

Mr. Clark: Well, he certainly has the privilege of doing that.

Mr. Welch: Oh, yes.

May we have the question read?

The Member: Read the question.

(Last question read.)

A. Yes, sir; I believe I would.

X Q. 344. (By Mr. Welch). You would have preferred refinancing; that is right, isn't it? A. I believe so.

X Q. 345. Now, suppose I had sat on the board with you, Mr. Merriman, and I had said, "Mr. Merriman, I respect you but I would like to accumulate and pay them off." Would you have respected that position on my part? A. I would

have respected your position under any circumstances, but I would have criticized your failure to approve the purchasing of the company's obligations that were selling in the market from 20 to 25 percent discount.

X-Q. 346. Oh, that is another matter, and, between you and me, I think that criticism might have been pretty fair. *A.* Which would have reduced the obligations then and there.

X-Q. 347. Yes. *A.* Instead of waiting until 1940 to reduce them.

X-Q. 348. I think, Mr. Merriman, if I had said to you, "I am in favor of paying off the debts," I think you might have said to me, "Well, if so, why don't you go out and buy the bonds at a discount," and I think I might have said, "I think I will."

You follow me there, don't you? *A.* Yes, sir.

X-Q. 349. I am only asking you this: If I just sat at the table with you and heard you say you were in favor of refinancing, and I said, "No, by George, I would like to accumulate and pay them off," you wouldn't have considered my position utterly unreasonable, would you? *A.* I would have considered it somewhat unreasonable in view of the remarkable amount of cash or quick resources that were available to pay them off as of 1933.

X-Q. 350. All right.

Now, can I just have a little argument with you in the directors' room, when you say you think I am wrong and you are right? Suppose I said to you as we sat there, "But, Mr. Merriman, we are going through a panic here"? Would that have made you think my stand more reasonable? *A.* A panic?

X-Q. 351. Yes. *A.* A panic, Mr. Welch, is a great opportunity for this company. The loss of earnings that we get, and I am speaking now as a director—the loss of earnings

that comes to us as a result of this depression and panic is offset by the fact that we can buy our own securities at panic prices.

X-Q. 352. I see.

Well, look at the chart here, Exhibit 45, and watch the blue column toboggan from '31 to '33, and tell me if you think the panic helped this company.

A. That company used certain of its resources—all of these companies used certain of these resources to protect certain of their interests, or, at least, that is my interpretation of the testimony.

X-Q. 353. I would like you to answer my question. Just look at S-45 and tell me if you think that panic helped this taxpayer. *A.* I do not think the panic helped this taxpayer.

X-Q. 354. Right. *A.* No, sir.

X-Q. 355. Would you go so far—

The Member: I was about to suspend for a few minutes, but before I do so are you through, Mr. Welch, with the consideration to be given by the witness to this idea that he expressed about the refinancing of the lease, continuing with the lease, or its income?

Mr. Welch: Or disposing of it?

The Member: Or disposing of it?

Mr. Welch: I think I am.

The Member: May I ask a question, then, regarding it, interrupting your line of thought? And that has to do with whether in your statement that it was merely an alternative to the company as to whether it would continue or whether—that is, to continue to have this investment in fixed income or whether it would be wiser to dispose of it and shift its wealth into a more diversified income-producing investment—that is as I understood you.

The Witness: Yes, sir.

The Member: Now, I want to know, and you didn't say

anything about it, whether that alternative is affected by the factor of the depression in 1930, and, if so, how, and whether it would tilt the scales toward one or the other of the alternative available decisions.

Now, if you would rather wait until after the recess before you answer, why, we can recess now.

The Witness: I would rather check one or two figures.

The Member: All right. We will take a few minutes' recess, after which the witness can answer.

(There was a short recess taken.)

The Witness: I believe Your Honor's question was whether the depression of '30 to '33 had any important effect upon the value of railroad securities—

The Member: No, no. My question didn't have anything to do with the value of railroad securities.

My question was as to whether the fact of the depression as it existed in 1930 to 1933 would have, in your judgment, any influence in the determination of which of the two alternatives had better be adopted of the two alternatives that you suggested, keeping on with the fixed income security involved in that lease, or shifting that into a more greatly diversified investment, which is what I understood you to say were the alternatives.

The Witness: Yes, sir. I think it would have a bearing for the reason that investment opportunities were on the bargain counter, so to speak, in 1932 and '33, particularly, whereas the yield obtainable on railroad stocks similar to the Chicago Junction Railway Company was relatively low, and since the company had this great asset, it might well have considered reduction in the size of that asset, the amount of that stock that would be held, and that the sale of that either for the purpose of acquiring other investments that would be helpful in its enterprise, or the acquirement of other of its own securities at a large discount.

The Member: So that, concretely, you would say, if I understand your answer, that the factor of the depression would reasonably have led the corporation to make a change rather than to continue in the situation in which it was?

The Witness: Yes, sir.

The Member: Now, Mr. Welch.

X-Q. 356. (By Mr. Welch). Now, let's go back to that directors' meeting that you and I are both attending, when I am all for accumulating cash and paying off debts in 1940, and you are all for no accumulations and refinance. Do you remember? A. Yes.

X-Q. 357. Now, suppose that at that directors' meeting you brought this suggestion about selling this wonderful asset, the Railway Company, and suppose I had said to you, "Mr. Merriman, it doesn't look to me like a time to change. These are perilous times. I feel more comfortable just sitting on that lease."

You wouldn't have thought me unreasonable in saying that to you, would you? A. That again depends on your definition of "unreasonable."

X-Q. 358. Well, that is a tough thing, but just however you would use it. You wouldn't think I was just silly to talk that way, would you? A. I would think it was bad business policy to carry that many eggs in one basket.

X-Q. 359. Yes. That isn't my question.

Would you think I was unreasonable if I took the other view and said, "I feel much more comfortable with that fine old lease behind me"? A. I would think your knowledge of investment conditions existing at that time was not very good, Mr. Welch.

X-Q. 360. Yes, but once again that is not the question. Would you think that you had an ugly, unreasonable director sitting with you when I took that stand? A. I would think he was somewhat pig-headed; yes, sir.

X-Q. 361. Pig-headed. And are, in your vocabulary, pig-headed people unreasonable? A. In my vocabulary it means stubborn.

X-Q. 362. But now that isn't the question. I will assume that I will stay put, see. I will be stubborn about wanting the fine old lease. I only ask you if the decision on my part that I want to stay put and stand by it is an unreasonable decision. A. Yes, sir; I think it is.

X-Q. 363. Unreasonable.

Let's assume we are still in that same directors' meeting and I say this to you: Let's assume, Mr. Merriman, that we are in a directors' meeting in 1930, and I say to you, when we are having our discussion, "We have paid 5 percent on the common, the only stock, ever since 1924, when the New York Central lease came in. It is $400,000 a year. And all of the fellows at the club tell me there is a panic on. I don't think we ought to increase that dividend this year."

And I said that to you, what would you have said to me? A. You are asking for a specific statement with respect to one specific meeting.

X-Q. 364. Yes. This is our dividend meeting in 1930, and when I say that to you, would you say to me, "Oh, no, Welch, this is the time to increase it"? A. I would have said to you

X-Q. 365. Would you have said that? A. American corporations, leading industrial corporations throughout the United States were tending to increase the percentage they paid in dividends to enable their stockholders to combat the force of the depression, and for that reason a well-financed company "such as ours with virtually impregnable resources should increase its dividend, since it was paying such a tiny proportion of the earnings that the large well financed industrial companies of the United States which had less stable sources of income than we had were paying 60 to 65

percent of the earnings, and we were paying less in 1930—our dividend rate was less than 20 percent;" and I would have thought that our stockholders would be entitled to a greater distribution than they received.

X-Q. 366. "Our stockholders"? A. Our stockholder.

X-Q. 367. Our stockholder. But suppose I said to you right away, "Mr. Merriman, I don't care anything about what these other companies are doing with their big groups of stockholders. I am the only stockholder here. $400,000 a year is all I need by any stretch of the imagination."

"Don't you think, Mr. Merriman, we would do well to keep the company strong in times like this"?

Had I said that to you would that have sounded to you unreasonable on that part? A. I would have stated that I think—

X-Q. 368. The question is, would that have sounded unreasonable on my part? A. I would have said, "I consider it unreasonable"—

X-Q. 369. The question is—I beg your pardon.

The Member: Now, wait just a minute. He is about to answer your question.

A. "I would consider it unreasonable to continue to build up surplus."

X-Q. 370. All right. A. "In this fashion. We have already accumulated such a large surplus, unless we reinvest this money in some fashion I think properly it should be paid in dividends."

X-Q. 371. Now, suppose at that same meeting, I said to you, "Mr. Merriman, they tell me at the club that all kinds of people are hoarding currency in their bank deposit boxes. That being true, I want to keep a lot of cash around. It looks black, and cash certainly is power."

Would you have thought it unreasonable for me to say that to you? A. No, sir.

X-Q. 372. Suppose I had said to you in that meeting, "Mr. Merriman, I am worried about that New York Central thing. A receivership here might not be out of the cards, and I would certainly like to have some cash in the till if a blow like that struck us."

Would that speech of mine have sounded unreasonable to you? A. In 1930?

X-Q. 373. Yes. A. Yes, sir.

X-Q. 374. Well, suppose I take you to a directors' meeting in 1933, and you are as always for refinancing, and I am on the conservative side; saying I would like to have money enough to pay these debts, and I said to you, in 1933, "Mr. Merriman, I don't like the looks of the railroads. Receiverships are coming pretty thick, and we will be plenty worried if there is a receivership of the New York Central, and I would like to have some cash in the till if that blow strikes us."

Would you have thought that speech of mine unreasonable? A. No, sir.

X-Q. 375. Now, Mr. Merriman, let us suppose that at this 1930 directors' meeting, I just smiled to you, and say "You impress me, Mr. Merriman. What do you say we ought to declare out this year?" What would you then have said to me? A. Well, I haven't given that matter consideration. That was not part of my preparation, matter of what I would have considered at an unknown date in 1930, the amount that should have been distributed by the Chicago Stock Yards Company.

X-Q. 376. Well, will you consider it now? Just think back and tell me what you would have said to me when I acceded to your view and said, "O. K., we will declare some more out this year. Now, what do you say we had better declare out?" A. This is merely an offhand opinion.

X-Q. 377. That is what we directors have to act on. *A.* No, sir; I don't think directors have to act that way.

X-Q. 378. Well, in any event, I doubt if they knew more about their situation then than you know about this situation, having studied it since last November, and you an expert. *A.* I would have said that the payment by this company in 1930 of 60 percent of net income would have been a conservative dividend for it to have paid in view of its position during last year.

X-Q. 379. If I had acceded to that view of yours and said I would stand for 60 percent, you and I would have been friends and gone to lunch together all right; wouldn't we? *A.* Yes, sir.

X-Q. 380. All right. Now, let's meet again next year, in 1931, and we have our argument over it again, and you are very convincing, and I say to you, "Well, O.K., Mr. Merriman, I think you are kind of careless with our cash, but what do you want to declare out this year?" What would you then have said? *A.* I believe in that year I would have either said 50 or 60 percent.

X-Q. 381. Either fifty or sixty. You are coming down a little, I notice, aren't you? *A.* Yes, the situation was worse in

X-Q. 382. I didn't ask you why. *A.* —in 1931.

X-Q. 383. I just said I noticed that you were coming down.

The Member: How much is that in dollars at 60 percent in 1930 or 60 or 50 percent in '31?

The Witness: It would be, in '31, approximately $1,500,000.

The Member: Instead of $400,000?

The Witness: Yes. And in 1930, it would be about $1,800,000.

X-Q. 384. (By Mr. Welch). Now, let's go to '32, and sit down at our directors' meeting and let's assume that you

see your old friend Welch looking awfully gloomy when he comes in this year, because you remember that was an awfully black year; don't you?

The Witness: Pardon me. I gave Your Honor the wrong figure. I was looking at '29 earnings. That would have been approximately $1,800,000 in 1930, and $1,175,000 in 1931.

The Member: That is $1,800,000 as the 60 percent?

The Witness: Yes, sir.

X-Q. 385. (By Mr. Welch). Now, I will start over again with the year '32, when we meet again for our declaration, you see. And I ask you to assume, if you will, that I come in looking sort of gloomy and worried as most business men did, and let's assume that we have our old fight over again, I claiming that we ought to keep cash, and you say, "No, I am a pretty gay spender," and I accede, but reluctantly.

What do want to take out of the business in that black year? *A.* I think 50 percent is the lowest—

X-Q. 386. Fifty percent? *A.* —I would have advocated under the circumstances.

X-Q. 387. Now, let's meet once more, and I am being this gracious fellow and acceding to your views. We meet in '33, and this time I say to you, "Mr. Merriman, this balancing of yours has got me worried. We have just been cracked 10 millions in the Chicago banks. I don't think you ought to go as strong as you have been going."

What would you have pushed out of the Maine Company in that year over my objection, although I really finally accede to your view? *A.* I would have said your statement is erroneous, Mr. Welch. "We have been in the process of encountering losses as a result of the Chicago bank situation for a period of certainly, at least, two years, and the dividend policy of 1931 recognized that fact, and I would again pay 50 percent."

X-Q. 388. Fifty percent.

The Member: Can you give me those amounts for '32 and '33?

The Witness: Yes, sir. In '32, it would be $1,100,000, in round figures.

The Member: That is what you say would be 50 percent?

The Witness: Yes, sir.

The Member: Instead of the $400,000?

The Witness: Yes, sir. And in '33, it would be $1,120,000, in round figures.

X-Q. 389. (By Mr. Welch). Now, Mr. Merriman, suppose that at that same 1933 directors' meeting I said to you, "Mr. Merriman, if you look at this whole enterprise you will find we are in the red this year." A. Yes, sir.

X-Q. 390. Would you still have said you wanted a dividend declared? A. I would have said, "We have had certain large non-recurring losses of a type that every enterprise might expect once in a generation or once in a lifetime, and just as we had a large non-recurring profit in 1932, and I think our stockholder is entitled to stability in his dividends, and I think the fact that the surplus position of our company has held up as well as it has, under the circumstances is a remarkable achievement, and I see no reason in view of the fact that the bank difficulties are now reasonably out of the way, and we begin to recover cash in the course of time on these subordinated deposits, that we should be ultra-conservative in view of the fact that the dividend represents such a provision of 50 percent leaves us a very substantial surplus in the last few years."

The Member: Well, you would have said that a 50 percent dividend should be declared?

The Witness: Yes, sir.

The Member: Fifty percent of the earnings should have been declared in dividends?

The Witness: Treating the bank losses of 1933 as non-recurring losses of our subsidiaries.

X-Q. 391. (By Mr. Welch). Now, suppose, Mr. Merriman, that in that 1933 directors' meeting I had had this chart in there, and I said to you, "Look here, Merriman, see how we climbed up the hill." I am speaking of Exhibit 45. "From '24 to '31, and see how we pulled the load of what we had to do down somewhat, and look what you are doing to us. We are slipping off again. And in view of that, Mr. Merriman, I would like to go back to that old comfortable dividend of $400,000 a year."

Would you have thought that suggestion on my part unreasonable? A. I would have said, "It was unreasonable in view of our failure to take appropriate action in retiring the obligations that represented the red columns. We should have paid more attention to pulling down that red column all of the time since we could buy our securities of our own subsidiary companies at such large discounts. Cash would be better applied in that fashion, in my opinion, than allowing it to stay idle in the bank."

X-Q. 392. O. K.

Then, Mr. Merriman, suppose I say to you, "I have been hearing you tell me that for years, and I am going to plunk for your theory." Would you have been happy if I would have taken the surplus funds of the company and gone out and bought all of the securities I could have bought at prices below par? A. I would have been happy if you had bought them on a reasonable basis.

X-Q. 393. Right. And let's assume that in 1933 I could have taken everything in the corporate treasury and bought bonds of the subsidiaries at a discount, you would have given me three cheers had I done so and declared no dividend then, wouldn't you? A. I still think our stockholder would have been entitled to a reasonable dividend in view of the

fact that that very action would have created a very large additional surplus for our company.

X-Q. 394. But remember, I am always the only stockholder and I keep saying to you, "Mr. Merriman, I don't care about myself. I love this company. I want to leave it as a strong company when I die, and won't you go with me now? You have been preaching all these years that we ought to buy the bonds of our subsidiaries. Won't you go with me and we will take all we got in the world and go out and buy them as far as we can and pay no dividend."

You would certainly have had to go along with me, wouldn't you? *A.* If you were the sole stockholder, I would certainly have had to go along with you, if that was your desire.

X-Q. 395. Now, just one more thing, Mr. Merriman. When we talked about these years '30, '31, '32, and '33, you started saying 60 percent might go out. *A.* Yes, sir.

X-Q. 396. And the next year, in '31, 50 to 60? *A.* Yes, sir; I think I said 50 to 60.

X-Q. 397. And the last two years 50? *A.* Yes.

X-Q. 398. It follows that you are in favor of some accumulations; aren't you? *A.* I have given you merely an offhand opinion as to what I would have done in those particular years.

X-Q. 399. And what you would have done would have been to have plunked for the theory of some substantial accumulations, wouldn't you? *A.* I am not certain about that. I have given you, as I have said, an offhand opinion.

X-Q. 400. When you plunk for the theory that you would declare out 60 percent, you are plunking for the theory that you will accumulate 40, aren't you? *A.* Yes, sir.

X-Q. 401. And when you plunk for the theory that you will declare out 50, you are plunking for the theory that you will accumulate 50, aren't you? *A.* Yes, sir.

X-Q. 402. So the theory of accumulation in some figure for the 1940 crisis is subscribed to by you, isn't it? *A.* I don't consider that there is a 1940 crisis.

X-Q. 403. Strike out the word "crisis."

So that the theory of some accumulation for the 1940 liquidation of the Jersey Company is subscribed to by you? *A.* No, sir. The theory of some accumulation is based on the fact that it is always wise to retain some proportion of your earnings for unforeseeable difficulties or unforeseeable opportunities, either one, and that is the basic theory on which I would tend to reserve a surplus as a matter of insurance against the unforeseeable.

X-Q. 404. And the difficulty, Mr. Merriman, of liquidating the Jersey Company in 1940 was entirely unforeseeable in '30 to '33— *A.* I would—

X-Q. 405. May I finish my question, sir? *A.* Certainly.

X-Q. 406. What difficulties might, in fact, be met in liquidating the Jersey Company in 1940 and ridding this enterprise of its debt were, of course, entirely unforeseeable in the years 1930 to '33, weren't they? *A.* Yes, sir; and in view of that fact I would have advocated the elimination of the Jersey Company at or prior to 1933, whenever financial conditions were good.

Mr. Welch: I think that is—

The Member: At or prior to what?

The Witness: 1933, whenever financial conditions were good.

X-Q. 407. (By Mr. Welch). Don't you also mean at or prior to 1940, too? *A.* Yes, sir.

The Member: I don't understand what 1933 plays in your mind as to the elimination of the New Jersey Company at or prior to 1933.

The Witness: Mr. Welch has had me at a theoretical directors' table, and I would have considered long before

1933. Your Honor, had I been at such a directors' table, that the New Jersey Company played no useful function in the Chicago Stock Yards enterprise, being virtually nothing but a conduit from which money flowed from operating companies up to the Chicago Stock Yards Company, and I would have tended to eliminate that because of the nuisance that might be created by a minority common stockholder, even though his 9 percent dividend was guaranteed. There would be a question in my mind as to what he might do after 1940.

The Member: Aren't you interjecting an entirely new suggestion now than heretofore? As I understood, the alternative suggestions have been as to whether the New Jersey Company should be liquidated or eliminated, as you speak of it, at the expiration of its charter in 1940, or should be refinanced and by some means or other projected into the future. Now, do you mean to add to that alternative suggestion the third suggestion that it should, indeed, have been eliminated long prior to the expiration of its charter in 1940?

The Witness: It might well have been eliminated prior to that time, the elimination being timed when the refinancing of any obligations that it had outstanding would be comfortable, would be accomplished under normal financial conditions.

The Member: Well, do you take 1933 as that time? Is that why you said 1933?

The Witness: No, sir; I don't consider that 1933 would have been a good time to do it, but I would have considered that in 1933 the company might well have looked forward to doing that, when we had a normal market for the sale of bonds and high grade fixed interest-bearing stocks, which I think in '33 was—at the end of 1933 was certainly in reasonable prospect within two years, if not earlier.

The Member: Well, now, then, as I understand what you intended to have me understand was that during the years 1930 to 1933 it would have been the part of wisdom for the corporation to have contemplated the earliest elimination of the New Jersey Company when financial conditions permitted?

The Witness: Yes, sir.

The Member: Not to wait until 1940?

The Witness: Yes, sir.

The Member: And certainly not to project it beyond 1940?

The Witness: Yes, sir.

The Member: Is that the situation?

The Witness: That is.

The Member: And you thought that could have been reasonably determined in the years 1930 to 1933 as something to be contemplated within the next two or three years; that is to say, around 1935 or 1936?

The Witness: Yes, sir.

The Member: Is that your position?

The Witness: Then it would have been advisable to consider that.

The Member: Yes.

X-Q. 408. (By Mr. Welch). I am going to take up just two trivial matters with you, which I had in mind, and ask you as to these: Have you available Poor's Railroad Manual, Volume 38? If not, I think we have it. A. It may be in the library upstairs. I do not have one here.

Mr. Welch: I think there is one in the courtroom.

(The volume referred to was handed to the witness by Mr. Green.)

X-Q. 409. (By Mr. Welch). Would you look at the Chicago River and Indiana Railroad that you were testifying about yesterday? Have you got the page, sir? A. Yes, sir.

X-Q. 410. Do you remember how you told us how splendidly even the earnings of that company were and what a comfortable feeling that should give anyone who is on the lessor end of the lease? A. Oh, I didn't say they were splendidly even. I thought they were very good.

X-Q. 411. Very good. I am always using words that witnesses don't use, and I am very much to be criticized for it.

You said they were very good? A. Yes, sir.

X-Q. 412. Will you follow along with what you have there and tell us how very good they were in 1934? First, let's have the last year you gave us, which was what? A. '33.

X-Q. 413. Was what? A. The net income?

X-Q. 414. Yes. A. Net income after rental and other charges was $715,728.

X-Q. 415. Now, take '34. That again is very good, isn't it? A. That is $1,010,691.

X-Q. 416. Now, let's take '35. Is that so very good? A. '35, the figure shows $387,940, with some sort of a note. The note says, "Restated for comparative purpose." I don't know just what that note means.

X-Q. 417. Well, if you don't, I don't.

Let's take 1936. How very good are they in that year? A. $256,176.

X-Q. 418. We are on the down grade, aren't we? A. Yes, sir; they have declined.

X-Q. 419. Tell us where we land in '37, will you? A. There is a loss after charges of $130,000.

X-Q. 420. I see.

Now, let me turn to Produce Terminal a moment. You remember you told us yesterday that Produce Terminal had had remarkable earnings right through the depression, and that it was a steady producer of revenue. Do you remember? A. Yes, sir.

X-Q. 421. And a comfortable thing to look at. Do you remember that? A. Yes, sir.

Mr. Welch: May I have Exhibit N, please?

(The exhibit was handed to Mr. Welch.)

X-Q. 422. (By Mr. Welch). I think you told us that the earnings of Produce Terminal were so steady and so comfortable that that corporation ought to be capitalized for four or four and a half millions, did you not? A. Yes, sir.

X-Q. 423. Well, will you glance at Respondent's Exhibit N and tell me what profit Produce Terminal showed in 1935, this steady producer of pleasant income? A. This statement reads: "Net income per books, $84,360," in 1934.

X-Q. 424. I was asking about 1935. A. I beg your pardon.

$17,998.98, red figure, in 1936.

X-Q. 425. Does that exhibit introduced by the Respondent in the case shake you at all as to the steadiness of that income from Produce Terminal? A. That—

X-Q. 426. Just "yes" or "no." Does it shake you? A. Yes, sir. It is some evidence that the income has declined.

X-Q. 427. Does that exhibit introduced by the Respondent shake you at all, in your opinion, that Produce Terminal was worth four or four and a half million dollars? A. As of what date?

X-Q. 428. In 1935, sir. A. Oh, I would not express any opinion whatever as to Produce Terminal in 1935, because I do not know what property it had, whether it sold half of its property, whether it did something after 1933. I have no information whatever. I consid red no information in this case subsequent to 1933. It is against my basic policy to consider information of a later date.

X-Q. 429. Curiously enough, I can agree with you. I tried to stop the case in 1933. A. Yes.

What kind of company Produce Terminal was in 1935 I don't know.

X-Q. 430. It was not the kind that is worth four million and a half, of what you see there from earnings, was it? A. Not on the basis of those earnings; no, sir. If those are the correct earnings of the property, it certainly had deteriorated in value to some extent.

Mr. Welch: That is all.

The Member: Wait just a minute, Mr. Merriman. You have something more; have you not, Mr. Clark?

Mr. Clark: Yes, I have some questions on redirect.

Redirect Examination.

Q. 431. (By Mr. Clark). I show you a document, Mr. Merriman, and ask you if that is the one which was exhibited to you by Petitioner's Counsel in the course of cross examination as to your testimony as to whether Petitioner was a holding company and nothing more. A. Yes, sir; it is.

Q. 432. What is that document A. That document is the report and recommendations of the Examiner for the Secretary of Agriculture, Bureau of Animal Industries, Docket No. 472, Secretary of Agriculture, complainant, v. Union Stock Yards and Transit Company of Chicago, Respondent.

Q. 433. Well, now, what does that amount to? Do you know what it amounts to, this sort of report and recommendation of the Examiner?

Mr. Welch: Objection.

Mr. Clark: I am asking—

The Member: He is asking if he knows. He may answer whether he knows or not.

A. I believe so.

Q. 434. (By Mr. Clark). Well, will you state—

Mr. Welch: What it amounts to?

Mr. Clark: Yes; what it is.

Mr. Welch: Objection.

What it is?

Mr. Clark: Well, what it means, what place it has in the Department of Agriculture, or the Secretary of Agriculture's findings, if he knows. He said he does.

Mr. Welch: What place it has? It may have a place in the library.

Mr. Clark: What its weight is.

Mr. Welch: What its weight is in this courtroom?

Mr. Clark: No, sir; in the Department of Agriculture.

Mr. Welch: In the Department of Agriculture.

Mr. Clark: Yes.

Mr. Welch: Well—I don't care. Go ahead and answer.

A. I understand it to be the report and recommendations to the Secretary of Agriculture to aid him in his decision in this case.

Q. 435. (By Mr. Clark). Is it or is it not a decision on the part of the Secretary of Agriculture? A. It is not a decision on the part of the Secretary of Agriculture, so far as I understand the document from reading it.

Q. 436. Do you know whether stock yards companies must be registered under the Act of 1920 with the Department of Agriculture? A. Yes, sir. I believe it is the Act of 1920. I am not certain of the date of the Act.

Q. 437. Well, approximately. A. Yes, sir.

Q. 438. Have you inquired whether the Chicago Stock Yards Company is so registered? A. Yes, sir.

Q. 439. And what did you find out? A. I found that it had never registered as a stock yards company.

Q. 440. Mr. Merriman, do you think, in your opinion, that if the Maine Company had distributed its income in reasonably substantial amounts, there would have been the bank

losses which were suffered, to which reference has been made? A. I don't think the two had much relation to each other.

Mr. Clark: That is all.

Recross-Examination.

X-Q. 441. (By Mr. Welch). Mr. Merriman, you know, do you not, that the Transit Company files tariffs with the Secretary of Agriculture and must operate under those tariffs? A. Oh, yes.

Mr. Welch: That is all.

The Member: I do not understand this ten times scale that you have used, the lines superimposed on Exhibit 45. I am completely befogged about that. What is the theory of that?

The Witness: The theory—

The Member: Perhaps you had better tell me what you did before you tell me what the theory is.

The Witness: May I go to that chart, Your Honor?

The Member: Yes.

(The witness left the witness stand and approached the chart.)

The Witness: I set a scale for this figure of net income of the Maine Company, which I superimposed on this chart, of $500,000 for the $5,000,000 figure of the asset scale, and $1,000,000 for the $10,000,000 asset, the figure shown on the scale, million and a half, two million, and two and a half million, respectively, where the fifteen million and twenty million and twenty-five million figures are shown on the right-hand side of the chart.

Starting in the year 1914, had I used this identical scale to represent these surplus earnings, the maximum that my superimposed line would have reached was about half way up to the five million mark, if I had used the identical scale

for plotting the earnings. I therefore increased the scale so as to make the arithmetical relationship between the points on the scale exactly the same as it is on this scale, but in order to give a visual representation of how the net income above charges had tended to increase I raised the scale to a figure ten times the actual. I adjusted the scale so that the $500,000 would be equivalent to that of the five million dollar figure on this scale, and I did that in part because there is an old popular rule from the prospectus of securities that ten times earnings is a very popular capitalization.

Now, this is not the earnings that is plotted on this chart; it is net income over and above the fixed charges of the Maine Company and its subsidiaries, so it is surplus over net income; and down in this period (indicating) it started at a figure, as I remember it, of $167,000 in 1914, and it rose so that it was in the neighborhood of two or two and a half million dollars per annum in the latter part of the period.

Does that make it clear to Your Honor?

The Member: No. I am completely befogged by it. I do not understand it at all. I thought I understood the rationale of this chart, No. 45, as for whatever weight it might have, indicating a comparison of the amount needed with the amount available. That is stating it perhaps too simply.

The Witness: Yes.

The Member: That is my understanding of the loose meaning of this chart.

Now, how does your line, your curve, fit into that? Does it change that significance? I confess that it changes my picture entirely when you impose two different prospectus in the same picture, if you know what I mean. You have got two things on the same scale. It means something. Now you are changing the scale, and I just do not understand it.

I would like to have you take all the time that you think you need to put it into my mind.

The Witness: The purpose, Your Honor, is to effect on this a visual representation of what I might term to be the earnings margin of safety for our outstanding obligations. Now, the outstanding obligations of this enterprise are shown by the red columns, and they carry with them certain fixed charges of interest and dividends. The margin of safety over those fixed charges and dividends, in general, is represented by the net income of the Maine Company, since in most years it tended to draw out virtually all of the earnings of its controlled companies. That net income in relation to the red line, starting in 1914, was a very small proportion of the red line—of the red column. The net income gradually rises, and by 1922 it averages nearly as high as these red columns, about 80 percent of them at the top of the red columns.

The Member: Now, take 1922—

The Witness: That means that we have surplus income for financing this very small difference between the blue—the top of the blue column and the top of the red column. That difference represents the amount for which we do not have cash and other resources that we consider as virtually equivalent to cash.

The Member: Well, what is the figure for 1922 from which this blue column shown on Exhibit 45 should be elongated alongside of the red column upon the same scale?

The Witness: I am not speaking of the elongation of the blue column at all, Your Honor. I am speaking about a visual representation of the margin of safety we have for financing this business, the requirements of this business, on a basis of ten times earnings. That is the effect of this representation that I have put on this chart.

Here (indicating) we have a figure of approximately, for

1933, 18 million dollars, or 17½ million dollars of quick resources to meet total obligations of about 28 million dollars. That means this gap between here and here (indicating) is about 10 million dollars. Now, in that year we have about $2,200,000 of surplus income over all our charges. It represents the margin of safety, it represents the income we have that we could finance this son, this small margin, assuming we choose to pay off all the other obligations.

In this earlier year we have 35½ million in 1914, approximately of obligations, and we have about 6 or 6 and a fraction millions of cash resources, so that the difference in the two columns is about 29 million dollars, and our margin of safety in the year 1914 is $167,000, as shown by the red line—the blue line that I superimposed on that chart.

The Member: Does that ten times business that you used, this scale—is it merely a use of the rule of thumb, that property is usually worth ten times its earnings? Is that what you mean by it?

The Witness: No, sir. The ten times scale is put on to show the correlation of the movement between the blue column and the other figures—not the blue column, but the blue line and the other figures on the chart, in order to show that correlation, and the scale works out so that we do get this ten times earnings effect, but this blue line does not include the earnings that are necessary to pay these fixed charges, because they have already been deducted from the net income, they have already been paid.

The Member: I suppose after I read this record I will understand it. I do not understand it now.

The Witness: It is difficult, Your Honor, for me to find words, with laryngitis bothering me, to explain it more fully than I have.

As I see the significance of Petitioner's Exhibit No. 45,

it is a showing of the growing cash resources that the company has and a certain trend toward diminution of its fixed liabilities. Now, if I were to examine that from the standpoint of the question of what we should do, whether we should continue to build up cash, or whether we should adopt some other policy, I would examine it in the light of the earnings that we had available for the building up of this blue column, until it reached a figure higher than the red column, or for the purpose of ascertaining whether we had a fully ample margin of excess earnings on which to finance this obligation—this collection of obligations.

At any time in the period before 1922 that margin of earnings to finance the amount represented by the difference in the length of the blue and the red lines was, in my opinion, light, and since that time it has become, in my opinion, more than ample.

The Member: Well, I will let this go. I will stop now, because it is lunch time, but if at the reconvening after lunch Counsel think that that can be elucidated in a more primitive language, so that I can understand it, I would be grateful for it, but I am not going to pursue it any further now, because it is, apparently, so far over my head, for some reason, that I cannot get started on it. I may suggest, however, that to make it effective it might be well for the Respondent, instead of superimposing the blue line on Exhibit 45, the Respondent prepare his own exhibit, with a red bar, a green bar, or yellow bar, or anything else, instead of the present blue bar, so that I may disassociate in my own mind the so-called relation, or ratio, which Exhibit 45 has instilled in my mind from the ratio which the new exhibit is intended to give.

Perhaps it may be that my confusion is an attempt to think of two things at the same time, or keep in mind two pictures at the same time. I do not know what the explana-

tion of my own apparent stupidity is, but it is there, and I am suggesting to you that you might be able to clear it up. I do not want to go into the decision of this case with an exhibit by an intelligent witness which is completely over my head. After all, as stupid as I may seem to be, it is I who has got to decide this case, and the conceptions upon which I am to decide it are mine.

Now, you can see that there is no effect of your exhibit at all, and that is the situation right now. I tell you that with perfect frankness in order that you can improve it, if possible.

We will suspend until a quarter after two.

(Whereupon, at 12:45 o'clock p. m., a recess was taken until 2:15 o'clock p. m. of the same day.)

Afternoon Session.

The Division resumed hearings at 2:15 o'clock p. m., whereupon the following proceedings were had:

Mr. Clark: Relative, Your Honor, to the discussion which was had with Mr. Merriman this noon before recess, I have taken the matter up with him, and he says that he believes the better course from our point of view, if agreeable to Your Honor, would be for him to draft another chart, an entirely new chart, which he won't be able to complete until tomorrow at some time. Then we will file it with your leave, and he will resume the stand, if agreeable to you, and explain it.

The Member: Very well.

Mr. Clark: I don't think at this time that I will ask to withdraw our RRRR exhibit. I might want to eventually, but I don't know. There it is for whatever it is worth.

Mr. Pierson: Dr. Atkins, will you take the stand?

MR. PAUL M. ATKINS

called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Pierson). Will you state your name for the record, Dr. Atkins? *A.* Paul M. Atkins, A-t-k-i-n-s.

Q. 2. Where do you live? *A.* Montclair, N. J.

Q. 3. Where did you live prior to moving to Montclair? *A.* I lived for some 11 years in the City of Chicago.

Q. 4. Will you state your education and experience? *A.* I received my Bachelor of Arts degree from Yale University in 1914.

In the following year, while at work in the City of New Haven, I completed the work for my Master of Arts degree in economics, and I obtained that degree in 1915.

During that year, 1914 and '15, I was cost accountant for the Acme Wire Company in New Haven.

In the fall of 1915, I went to Gray & Davis, in Cambridge, Mass., to lay out a cost accounting system for them, and then I went to what is now the Square D Company. It was then known as the Detroit Fuse & Manufacturing Company in Detroit, Mich., to install a system of production control and cost accounts, and to act as production engineer for them.

About a year later I was recalled to the Acme Wire Company, in New Haven, to become their management engineer, and I remained there until the fall of 1917, when I entered military service.

I was recommended for my commission and went overseas in March, 1918. I continued with training and received my commission in April, I think it was, or May, 1918, and then was assigned to a heavy artillery school in Clermont,

Ferrand as one of the instructors. Shortly after the Armistice, I was appointed one of the specialists in the section of political, territorial, and economic intelligence of the American Commission to negotiate peace in Paris, and I also served as the American secretary of the sub-commission of the Peace Conference on Czechoslovak affairs.

Upon my return to this country, I became a senior engineer on the staff of L. V. Estes, Inc., of Chicago, consulting industrial engineers. I remained with them for about a year, and then I joined the faculty of the University of Chicago in the School of Commerce and business administration to take charge of the courses in industrial management and in industrial cost accounting.

In the years '24 and '25 I received a sabbatical leave, at which time I spent in Europe partly in travel and partly in study at the University of Paris, from which university I received my doctor's degree in economics, in 1925.

During the time that I was at the University of Chicago I continued my studies in business administration and economics at the University of Chicago and also took courses in mechanical and electrical engineering at Armour Institute of Technology, at Chicago.

I completed my contract with the university the academic year of 1926, and I then went to the firm of Ames, Emerich & Company, investment bankers in Chicago, with offices in the main office in Chicago, branch offices in New York, Philadelphia, St. Louis, Milwaukee, Los Angeles, and San Francisco. It is a large underwriting house, underwriting and distributing high grade securities, primarily bonds and preferred stocks. I went to them primarily to carry on investigations of their industrial underwritings, or proposed industrial underwritings, which necessitate my making a detailed analysis of the histories of the companies, business histories, the accounts, the policies of these vari-

ous companies whose securities they proposed to have underwritten.

Not long after I joined them they asked me to undertake an investigation of the investments of banks and bonds, and I made what I believe is probably the first comprehensive investigation of the investment policies of banks and the types of securities which they held and the types of securities which, upon the study, seemed wise for them to hold.

As an outgrowth of this study, I organized in Ames, Emerich & Company, an investment counsel department, in the first instance for service to banks, but subsequently enlarged to render service not only to individuals but also to corporations which had surplus funds available for investment.

In January, 1931, I was given leave of absence by Ames, Emerich & Company to accompany Professor Kemmerer, of Princeton University, as the public credit member of his financial mission to Peru. Then my primary task was to investigate the public debt of that country and offer suggestions for ways and means of dealing with that situation. I am sorry to have to say that they did not adopt the suggestions made by the commission, but I think the history of that debt is pretty well known.

Upon my return I rejoined the staff of Ames, Emerich & Company and stayed with them through a substantial part of the year 1931.

In January, 1932, I was appointed special liquidator of securities for the Comptroller of the Currency and opened up for him an office located physically in the Federal Reserve Bank of New York for the purpose of liquidating the securities of all kinds owned by insolvent national banks. I continued in this position for some five years. During this time I had entire charge of the operation of this of-

fice. It was my discretion to decide what was to be sold, when it was to be sold, at what prices it was to be sold, and what quantities, and to or through whom.

During these five years I liquidated securities having a par value of something in excess of $250,000,000, raising cash from the sale of these securities in excess of $150,000,000. During that time the office handled in excess of 10,000 different issues of securities, stocks and bonds, for some 1200 odd banks for whom we proceeded, and I did business with something over 350 different brokers, dealers, including a few of the individuals, in all parts of the country. It was to or through these brokers, dealers, that I disposed of these securities. The securities included, of course, in addition to a large volume of securities listed on the New York Stock Exchange, and other exchanges, a very substantial quantity of unlisted securities of all types.

At the end of five years I resigned from that position and accepted a position as a trustee and treasurer of the Alfred P. Sloan Foundation and also as treasurer of Mr. Alfred P. Sloan's several personal holding companies.

At the end of the year I resigned to go into private practice.

The Member: At the end of what year?

The Witness: At the end of my year then, which is in April, 1938. I resigned from that position to go into private practice as an investment counsel and consulting economist.

I have at times in the past been more or less writing on business and related subjects. I have had published three books on cost accounting, one on industrial management, two books on economic conditions, one in Europe and one in Latin America, and a book on the secondary reserves and investments of banks, together with one or two minor books. I have also had published something over 400 ar-

ticles in such papers as "The New York Times Analyst," the "Chicago Journal of Commerce," the "Bankers Magazine," the "Bankers Monthly," what used to be called the "Journal of American Bankers Association," and other technical magazines and papers.

Q. 5. (By Mr. Pierson). Have you previously testified before this Board? *A.* I have, sir.

Q. 6. To what extent? *A.* I have testified, I believe, in some three cases before this Board prior to this time. The first case in which I appeared was the Huntington will case, in Los Angeles, some 3 years or more ago, which involved the valuation of the securities of a personal holding company. Subsequently I have testified in cases involving the valuation of the stock of certain industrial concerns, the J. J. Newbury Company and the New Jersey Zinc Company.

The Member: Are those the styles of the cases?

The Witness: No, sir; those were the securities whose value was under consideration in those cases.

The Member: Do you know what cases they were?

The Witness: The J. J. Newbury case, I believe, appeared in that name. It involved the question of taxes on certain gifts made by Mr. and Mrs. Newbury for a trust fund. I am sorry to say that I have forgotten the name of the case in which the New Jersey Zinc Company stock figured. It had nothing to do with the New Jersey Zinc Company, however, but it involved the valuation of its stock. It was another gift tax case.

Mr. Pierson: I expect to prove by this witness, or will have the witness testify in rebuttal, in regard to the market for the bonds of the Maine Company, the New Jersey Company, and the Railroad Company, and he will give opinion testimony as to the possible ways of meeting the financial situation of the companies in the so-called family group as the record indicates may exist in 1940. The wit-

ness will also give opinion testimony as to whether Petitioner is other than a holding company, and will give further opinion testimony as to the value of the common stock of the New Jersey Company held by the Maine Company in the years 1939, 1932, and 1933.

Mr. Welch: Will you excuse me a moment while the stenographer gives me that?

(Record read.)

Mr. Welch: In so far as the witness will testify in rebuttal in regard to something about the market for bonds, of course his qualifications, I take it, are admitted. That I won't challenge. The second thing he is offered for is to testify as an opinion witness on the ways of meeting the financial needs of the enterprise in 1940. I observe in his qualifications no trace of any corporate management, no trace of ever having acted as a director or officer of any corporation of whatever size, and I suggest to Your Honor that in your discretion you might well rule that he is not qualified in that field and I shall object to testimony in that field. In the third place, it is said that he will testify as to his opinion that the Maine Company, whether or not it was anything other than a holding company. Your Honor already knows my position on that. I don't think the evidence is admissible in any event, and I am sure that nothing in this witness' qualifications, the statement of his qualifications would seem to qualify him as an expert in that field. I shall therefore object to his testifying as an expert in that field. Latterly, he will offer his opinion as to the value of the common stock of the New Jersey Company, and while I seriously doubt his qualifications, I should not object to his testifying if he wishes in that field.

The Member: I will overrule all of the objections on all of the grounds.

Mr. Welch: And save my exception, which I think is quite valueless.

The Member: Yes.

Q. 7. (By Mr. Pierson). With respect to your qualifications, Dr. Atkins, there was one more question that I would like to ask: If you ever analyzed the dividend policies of corporations? *A.* I had to do that on numerous occasions at the time when I was investigating corporations for Ames, Emerich & Company, when they were giving consideration as to whether or not they wished to underwrite any of their securities, that was done, of course, both in cases where the decision was to effect underwriting and decisions where it was decided not to undertake underwriting.

Q. 8. Dr. Atkins, when did you first begin a study of the Chicago Stock Yards enterprise? *A.* I began this study shortly after the middle of November, 1933.

Q. 9. And at whose request? *A.* At Mr. Clark's request.

Q. 10. Will you outline the study which you have made in that regard? *A.* I will endeavor to do so.

I began this study with a careful examination of the information contained in the preliminary copy of the stipulation, and the several exhibits which were attached to it, and in so far as that information—source of information is concerned, I have continued that with the final copies of the stipulation and of the exhibits that were subsequently attached to it.

I further made an investigation of the railroad situation, the stock market—the stock yards situation, studying not only the history of this company but the history of other stock yards in so far as that was available in published records.

Also I gave some little consideration to other lines of

business, more especially in the public utilities and the real estate situation.

Continuing in a more general way, I studied the general economic and business developments during the years immediately prior to the period under consideration; that is to say, the years 1930, '32, and '33, to see what transpired during that period, giving rather peculiar consideration to information contained in the New York Times Analyst and the Commercial and Financial Chronicle.

I also studied the history of a rather widely diversified group of companies to see what their financial experience had been during this period, and I also studied the record of the security markets as primarily recorded in the Commercial and Financial Chronicle, and in the published volumes of the National Bond Quotations Service.

That, in general, I think, summarizes the study which I have given to this case.

Mr. Welch: Mr. Pierson, I think perhaps I should have an opportunity to ask one or two more questions. That is some further qualification now, I think. Do you agree that those are further qualifications to enable him to testify as an expert?

Mr. Pierson: No, I don't think it is. I am merely asking the extent of his study.

Mr. Welch: Right.

Mr. Pierson: In regard to this Stock Yards enterprise.

Mr. Welch: I should like to be allowed to ask just one or two questions in connection with the statement that he has made of the study he has made.

Mr. Pierson: That is all right, Your Honor.

Cross-Examination.

X-Q. 11. (By Mr. Welch). I take it, you are about to express an opinion based on the study that you have made;

is that right, sir? A. I expect to be called upon to express an opinion.

X-Q. 12. And you intend to base that opinion on all of the things that you have studied in preparation to testifying? A. I expect to express that opinion on the results of my study.

X-Q. 13. And all of your studies? A. Yes.

Mr. Welch: Then I shall further object to his testimony because it is obvious that he has studied a considerable quantity of material that is not in evidence in the case, and that will be a fatal defect in his opinion because he has already said it was based on evidence outside the case.

The Member: I will overrule the objection.

Mr. Welch: And may I have another exception?

The Member: I shall be very glad if the cross-examination will elicit the extent to which that is true.

Direct Examination (Continued).

Q. 14. (By Mr. Pierson), In stating your study, Dr. Atkins, it was not clear as to whether or not you had made a special study of the prices and volume of the trading of securities of the companies in the Chicago Stock Yards enterprise; that is, more particularly, the New Jersey Company's 4's and 5's, and the Maine Company 5's, and Elevated Railroad Company 4's. A. Yes; I made a somewhat detailed study of certain of those securities, in particular, the listed securities of the New Jersey Company.

Q. 15. Did you make a study of the income of the Chicago Junction Railway Company, termed the Railway Company in this case, and the Chicago River and Indiana Railroad Company? A. I did.

Q. 16. And what was the purpose of your study in that connection? A. I find that the lease of certain properties either owned by the Chicago Junction Railway Company

or leased by it in perpetuity from the Transit Company to the Chicago River and Indiana Railroad Company was a very important source of income for the Railway Company, and through the Railway Company, for the so-called Maine Company. I felt, therefore, that before I could form an opinion in regard to this income and its possible influence upon any opinions which I might form with regard to the Maine Company, it was necessary for me to study the company from whom that income was derived under the terms of the lease.

Q. 17. And in that connection, did you also study the earnings and financial position of the Indiana Harbor Belt line? *A.* I did to a lesser extent.

Q. 18. Have you attended any of the hearings in this case? *A.* I have.

Q. 19. On what dates, do you recall? *A.* I believe I have been here at the hearings for the last three days.

Q. 20. And have you read the record in the case covering the prior hearings? *A.* I have.

Q. 21. Have you examined the exhibits of the Petitioner and Respondent, which have been introduced in evidence? *A.* I have, but in forming my opinions I have not given consideration to the data in the exhibits for the period after 1933, after the close of 1933.

The Member: You mean you examined all those income tax returns that were put in evidence?

The Witness: I have.

The Member: Of all these corporations for all of the years?

The Witness: I have examined some of them in rather haste, and I have studied some in considerable detail, sir. I don't mean to say that I examined—read every word in all of those papers, but I have tried to go through them and

pick out what seemed to me to be the essential information, and some of them I studied in considerable detail.

Q. 22. (By Mr. Pierson). Now, in the light of this, Dr. Atkins, have you an opinion as to whether the Maine Company in the years 1930, 1932, and 1933 accumulated its gains or profits in excess of the reasonable needs of the business? A. I have.

Mr. Welch: I object. He has answered it.

Now, go slowly, because I will want to object to the next one, I take it.

Mr. Pierson: I asked him if he had formed an opinion, and he says he has.

Mr. Welch: He has answered yes.

Q. 23. (By Mr. Pierson). What is your opinion in that regard?

Mr. Welch: Objection. Curiously enough, he was not offered on this ground. I was careful to listen to the offer and have it read to me. He was not offered on this ground.

The Member: Well, that is very true.

What have you got to say about that, Mr. Pierson? You didn't enumerate that as one of the things that he was offered for. Did you inadvertently omit it?

Mr. Pierson: I did inadvertently overlook that, Your Honor. That is one of the things that this witness will testify to, and if my opponent desires to make an objection at this time, or otherwise take some further action along that line—

Mr. Welch: Well, my objection would have been more passionate had he been offered on this point, because I see nothing in his qualifications that would indicate he is qualified to sit on the board of directors and weigh these troublesome questions of judgment that are so difficult to decide.

The Member: Do you want to cross-examine him as to his qualifications, or are you satisfied merely to object?

Mr. Welch: I object to it on the grounds that I have stated.

The Member: I will overrule the objection.

Mr. Welch: And save an exception.

Q. 24. (By Mr. Pierson). Will you state—

The Member: And this out of an abundance of doubt as to the propriety as to this entire method of trying on both sides, and the entire method of trying this issue. I have grave doubt as to whether the issue is one that can be tried on either side by this type of method.

Q. 25. (By Mr. Pierson). Will you state your opinion? A. My opinion is that during the years 1930, 1932, and 1933, the Maine Company did accumulate gains and profits to an unreasonable extent over and above the needs of the business.

Mr. Welch: Gains and profits to an unreasonable

The Witness: Unreasonable extent during these three years.

Q. 26. (By Mr. Pierson). Will you state your reasons for this opinion? A. I have a number of reasons for this opinion.

In the first place, I have looked at the balance sheet of the Maine Company and of its principal subsidiary companies—of the balance sheets, I should say, plural, the revised balance sheets, which I believe are in evidence, with particular consideration to the position of these companies on December 31, 1929,—in other words, the date immediately preceding the first year in question; and I find that on that date the Maine Company and its principal subsidiaries had, in round figures, $18,330,000 in liquid assets, of which, in round figures, $13,510,000 was in cash.

I next considered the experience of the several operating companies, more specifically the Railway Company, which obtained its income primarily from the $2,000,000 payable

annually under the terms of the lease of the property to the Chicago River and Indiana Railway Company. So far as

The Member: You classify the Railway Company as an operating company, do you?

The Witness: May I offer an explanation to that, Your Honor?

The Member: Yes.

The Witness: In the sense that it is a source of income to the Maine Company. As a matter of fact, it did not operate a railroad, of course; it simply leased the property. It was not in the strict sense a railroad company at all. I simply so regard it as a possible source of income to the Maine Company.

The income from this company which became available to the Maine Company seemed to me to be stable, highly stable.

I also gave consideration to the income from the Transit Company. Over a period of years the income from this company has been relatively stable, and that is engaged in an industry which belongs to a group of industries whose income has proved in the past to be relatively stable during good times and bad; in other words, the food industries as a group of companies, belong to the food industries group, have on the whole relatively stable earnings, and the income of the Transit Company is dependent primarily upon services rendered to companies in this group. As a matter of fact, it seems to me that it is probably in a better position than many other types of companies in this group, because its income is not dependent to any appreciable extent upon the values of inventories or upon the prices of agricultural products. It gets its income primarily from a service charge which is predicated upon the number or the quantity of the product handled rather than on the price.

As I look at the Produce Terminal Company during this

period, and the years immediately preceding, I find that its income has not only been stable but has shown a rather marked increase during this period and years immediately prior thereto.

The Central Manufacturing District, the trust, is subject to somewhat greater fluctuations, but none of its income during this period or prior to this period—I am referring to the years 1930, '32, and '33—were transmitted to the Maine Company.

All of these companies seem to me to be in sound condition as of this date. There was at that time, so far as I have been able to gather from my examination of the information available in regard to them, no indications that their position was not sound.

There was one company in this group, the Elevated—in addition to those named in this group, a subsidiary of the Maine Company, namely, Elevated Railroad Company, whose position was not satisfactory, but the total amount involved in this company was relatively small.

Q. 27. (By Mr. Pierson). In connection with your statement, Dr. Atkins, the Railroad Company was not a subsidiary of the Maine Company, was it? A. Not directly; a subsidiary of the New Jersey Company which in turn was a subsidiary of the Maine Company. In fact, once more perhaps I have been speaking rather loosely—the Transit Company, as I understand it, and the Railway Company, the Central Manufacturing District, and the Railroad Company, were all subsidiaries of the so-called New Jersey Company, which, in turn, was, or is still, a subsidiary of the Maine Company.

Produce Terminal Company on the dates in question was a direct subsidiary of the Maine Company.

I can see no particular reason, therefore, to anticipate as of my date, the 31st of December, 1929, any marked proba-

bility of emergency demands being made upon the resources of any of the companies in this group in the immediate future sessions emergency demands.

On the other hand, as I looked these companies over, it seemed to me that there would not be any very great demands made upon the resources for their further rapid expansion. Certainly in the case of the Railway Company there was no probability for a demand for expansion.

The business of the Transit Company, as I indicated, had been relatively stable, and with the growth of stock yards in other parts of the country I did not envisage any probability that it would need to expand any of its facilities in any major fashion.

The Produce Terminal Company during this period had been expanding, but had been doing so very largely out of its own earnings.

The Central Manufacturing District seemed to be the one which might be most likely to require funds for expansion. However, if business were to decline, I do not see any reason for expecting any large demand for the expansion of the Central Manufacturing District properties during a period of stationary or possibly declining business.

It seemed to me, therefore, as I viewed these facts, that there was no necessity for the group enterprise as a whole to look forward to an expenditure of important sums, either to meet emergencies within their own organizations or for the expansion of their several activities.

I find that the Maine Company was at that moment in possession of cash of, in round figures, some $6,600,000; that it had loaned substantial sums to its stockholder, at that time, I believe, the sole stockholder; that it had a portfolio of miscellaneous securities, which I understand are supposed to be general market securities of a liquidating nature.

In view of these facts, therefore, and in further view of the fact that the Maine Company had relieved itself of the responsibility, of the, as I understand it, legal responsibility for the payment of the principal of, I believe, all of the obligations of its subsidiaries, although it might have practical reasons for wishing to avoid those obligations, it seemed to me that as of December 31, 1929, it had accumulated sufficient assets and assets in such form that it did not need further during these years to accumulate additional funds.

Q. 28. From an examination of the stipulation which has been filed in this case, together with exhibits attached thereto and your reading of the record, hearing the testimony, and examination of the exhibits filed by Petitioner and Respondent in this case, have you formed an opinion as to whether the Maine Company was anything more than a holding or investment company in the years 1930, 1932, and 1933?

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

A. Yes, I have formed an opinion.

Q. 29. (By Mr. Pierson). What is your opinion in this regard? A. My opinion is that it was simply a holding company, a personal holding company.

The Member: A what?

The Witness: A personal holding company.

The Member: All right.

Q. 30. (By Mr. Pierson). Will you state your reasons?

A. I have a number of reasons—

The Member: Now, just a minute. That was not the question. The term "personal holding company" has become a part of the Revenue Acts. Now, if this witness is talking about a personal holding company in the lingo of the Reve-

nue Acts, it is not worth anything. If he is talking about a personal holding company in his own private lingo, it may be worth something or it may not, depending on what it is. If you ask the witness to answer your question, I will let him go on. If not, I will not permit him to go on exploring the field of the Revenue Acts.

The Witness: May I have that question again?

(The last question was read.)

Mr. Pierson: Read the one preceding that.

(Thereupon, the record was read.)

Q. 31. (By Mr. Pierson): Then, the next question, Doctor is? What is your opinion in this regard, and when I say "what is your opinion," that is without giving regard to the effect of the holding company as defined by income tax statutes. A. I at no time attempted to define it by the income tax statute. I will say simply that it is a holding company. Does that take out any possible legal definition on my part?

The Member: Do not ask me. I am not talking about legal definition or anything else. I want you to answer without talking about a personal holding company.

Q. 32. (By Mr. Pierson): Will you state your reasons for your answer in this regard? A. Well, I have a number of reasons for this opinion. I examined the income tax returns, more specifically, the income tax returns of the Maine Company and the New Jersey Company for the years 1930, '32, and '33, and I found therein certain information which seemed to me significant in indicating the nature of the activities of this company.

I find on the income tax returns in each of these years a statement to the effect that the kind of business, is the guaranteeing of securities. I think I quote it exactly from the return. So far as I have been able to discover, the guaranteeing of securities which was undertaken by this com-

pany was limited to the guarantee under the agreement or contract of 1914, which is in evidence. In other words, I have seen nothing in the information which I have gone over which would indicate that the guaranteeing of securities was an ordinary or recurring operation of the company. It was confined to that one agreement of which, of course, it is continuing in its effect through these years. So that activity of the business was essentially limited to the acquiring of securities.

I further find on examination of these income tax reports certain information in regard to the operating expenditures made by the Maine Company, and if one can draw an opinion from the amount of the expenditures it is rather apparent that the activities of this company were distinctly limited in their volume. I find, for example, compensation of officers of $50,500 in each of those years, of which $50,000 is a payment to the president, Mr. F. H. Prince, and the balance to the treasurer of the company. If the compensation paid the treasurer is any basis for judging the extent of his activity in behalf of the company, it was certainly distinctly limited.

I find that the salaries and wages paid in addition to compensation of officers as recorded is $2,000 in each of these years. This certainly would not indicate that the company was equipped with a very extensive staff carrying on operations of any kind, although it might well be sufficient to enable it to acquire and hold certain securities if it were not actively engaged in trading in them.

I find an item here for commissions of small amounts in the first two years apparently indicating some purchasing and sale of securities, but only a limited amount.

I find an item of rent of $375, if I recorded it correctly, in 1930, and a little less than $440 in 1932; and none, I believe, in 1933.

Mr. Welch: I didn't get that.

The Witness: None, I believe, in 1933.

A. (Continuing) I find that directors' fees in 1930 amounted to $90; in 1932, to $120; in 1933, to $90.

Once more, if the amount of the directors' fees can be used in any way as a measure of the number of directors' meetings, and, hence, the activities of the directors in the operations of this company, certainly their assistance and guidance and management was distinctly limited.

If I recorded these figures correctly, auditors were paid only in one year. Legal fees were none in 1930, only $50 in 1932, and something in excess of $15,000 in 1933.

Mr. Welch: We hope they won't be any higher this year.

The Witness: Of which you will obtain your fair proportion, Mr. Welch.

A. (Continuing) In other words, my analysis of the expenses of operation of this company would indicate to me that those operations were decidedly limited in character.

The Member: What do you mean by "analysis"? You have looked at the income tax returns, and you got some figures, and from those figures you have made imaginary inferences, haven't you?

The Witness: I have made certain deductions as a basis for forming an opinion. I find that the company is spending almost nothing for rent, and I find nothing is spent in wages and salaries except for $50,000 to its president, it seems to me a rather reasonable conclusion that its activities had been distinctly limited in extent and character. That perhaps is not conclusive evidence, but I think it is evidence leading towards that opinion.

A. (Continuing) I find that on examination of the income tax returns for the New Jersey Company, the consolidated income tax returns for the New Jersey Company, that Mr. Prince is shown as chairman of the board of the Transit

Company, chairman, I believe, of the Railroad Company; president of the New Jersey Company, and from the Maine return, president of the Stock Yards Company. And from other information, I understand that he was a trustee of the Central Manufacturing District trust at this time, and during the last year, I believe, part of 1932, although my recollection is not entirely clear on this, he was president of F. H. Prince & Company, Inc.

I also understand from the evidence which has been presented, that he is the principal and controlling partner in F. H. Prince & Company, a brokerage house.

Now, I find from these returns that, according to them, he spent 58 percent of his time as chairman of the Transit Company, and 42 percent of his time as chairman of the Railway Company and part of his time as president of the New Jersey Company, and time as required as president of the Stock Yards Company, and an undisclosed—I am not able to find how much time he spent on his work as trustee of the Central Manufacturing District, or F. H. Prince & Company, Inc., or F. H. Prince & Company, the brokerage house. I find that distribution of time holds for the first two years, and the last year it is shown as part time for the Transit, part time for the Railway, part time for the New Jersey, as required for the Stock Yards, the Maine Company, so that apparently, Mr. Prince,—I assume, of course that his distributions apply to his business hours,—has spent 100 percent of his business hours on the work of the Transit Company and the Railway Company and spent other time not specified on his work as an officer, trustee, and so on, of these other organizations. And I find it rather difficult to believe that from that information that he devoted very much of his time to the Maine Company. It seems to me, therefore, from my analysis of this information specifically and from whatever else I am able to have

learned from the other sources of information available, that the activity of the Maine Company was limited to being simply a holding company.

Q. 33. (By Mr. Pierson). Dr. Atkins, have you heard the testimony of Mr. Merriman with regard to the matter in which securities are bought and sold both on the organized exchanges and on the over-the-counter markets? *A.* I have.

Q. 34. Have you heard Mr. Merriman's testimony with regard to the volume of transactions in securities on the organized exchanges and on the over-the-counter market? *A.* I have.

Q. 35. What has been your experience in the respective places of organized exchange and over-the-counter market in the purchase and sale of securities? *A.* In the case of bonds as distinguished from stocks, the major portion of most types of bonds find their most ready market over-the-counter transactions and not

The Member: Is that a matter of your experience?

The Witness: Of my personal experience, sir, through five years as special liquidator of securities, during which time I was daily selling securities at all times, a long intimate experience with dealing with just that situation.

The Member: That is what you asked him? What his personal experience in selling bonds was in over the counter and on the exchanges; isn't that true?

Mr. Pierson: That is correct, Your Honor.

The Member: You are telling me how many of your transactions were over-the-counter and how many were on the stock exchanges; is that right?

The Witness: I am telling you what I found as a result of my experience. I hadn't attempted to say how I handled those particular transactions.

The Member: Well, I don't understand you. How does one man's experience tell him what the total number of

transactions are in one place or another that he doesn't have anything to do with?

Mr. Pierson: If Your Honor please, I was merely attempting to show —

The Member: I would understand it if he made some study, but his personal experience doesn't seem to me to be—

Mr. Pierson: I was merely laying a foundation to show that he had had these experiences, and I will ask him if he has made —

The Member: But I want to understand what it is that he is answering. You say that is his personal experience, and you ask, "What is your personal experience as to the relation between the sales of the exchange and over-the-counter." Now, what do you mean by that? Do you mean how many sales has he had over the counter and how many sales he has had on the exchanges, and what is the relation of one to another? Or do you mean "Have you made a study of how many sales there are on exchanges and how many sales there are on over-the-counter, irrespective of your personal participation"?

I don't know what it means.

Mr. Pierson: Well, I will reframe the question, Your Honor.

Q. 36. (By Mr. Pierson): Dr. Atkins, from your experience in selling securities in the organized exchange and in the over-the-counter market, what have you found with respect to the selling of bonds on the organized exchange and on the over-the-counter market? A. I found from my personal experience that the activity of the volume of purchase and sales of bonds is in general greater in the over-the-counter market than it is on the organized exchanges.

Q. 37. Have you made an investigation of the sales of the Maine Company, the New Jersey Company and of Railroad

Company bonds here in question during the years 1930 to 1933, inclusive, or in any prior years? A. I have made an investigation, yes.

Q. 38. What investigations have you made in that regard? A. I have made an investigation of the record of transactions in the New Jersey bonds, the New Jersey 4's and 5's, on the Boston Exchange as recorded in the weekly issues of the Commercial and Financial Chronicle, showing both volume and the prices received for the years 1929 to 1933, inclusive. I have made that weekly according to the reports in the weekly issues of the Commercial and Financial Chronicle.

The Member: We will take a short recess.

(There was a short recess taken.)

Q. 39. (By Mr. Pierson). Had you finished your answer, Doctor? A. I might add to that simply: I have made a summary of the transactions in volume only comparable to those for the years noted from 1923 to 1928, inclusive, so that my yearly summaries cover the years from 1923 to '33, inclusive. My weekly summaries from 1929 to 1933, inclusive.

Q. 40. And what is the result of your investigation in this regard? A. I found what to me appeared to be considerable activity, due consideration being given to the fact that transactions on the Boston Exchange are usually less numerous than on certain other exchanges, and also due consideration being given to the character of the bonds in question.

I find that through practically this entire period there was hardly a time when more than one week was skipped without transactions in either the 4's or 5's taking place, and that there were extended periods when transactions in one or the other of these bonds took place every week. I

find that in some weeks the volume was interestingly large. I can give those figures for some of these weeks if desired.

The figures recorded in the March 16, 1929, Commercial and Financial Chronicle showed 29 of the 5's bought and sold in that week; March 23, 14; March 30, 15; August 3, there were 31; September 7, 20; November 23, 23.

I have prepared here a table showing the results of this research, and a number of copies of it.

Mr. Pierson: If Your Honor please, I offer in evidence a schedule of the sales of the New Jersey Company bonds on the Boston Stock Exchange, which data is taken from the weekly issues of the Commercial and Financial Chronicle.

The Member: Did he say that?

The Witness: I think I did, sir.

The Member: That it came from the Commercial and Financial Chronicle?

The Witness: I believe I did, sir.

Mr. Pierson: I think that was stated. For the years 1923 to '33. That is with regard to the so-called 5's and 4's.

Mr. Welch: May I have a copy to glance at?

Mr. Pierson: Yes. Excuse me.

(Mr. Pierson hands a paperwriting to Mr. Welch.)

Mr. Welch: I would like to be permitted to say a word in objection to the exhibit, if I may.

If Your Honor please, this seems to me one of the by-ways of this case. I have been, myself, attracted down the road of many by-ways. It seems that the suggestion is made that the Maine Company might well have bought more of its subsidiaries' securities than it did buy, although the evidence is that it bought what seemed to me huge quantities of them. Now, what is the significance of this testimony? What is the sequitoir? Suppose I were to concede that the Maine Company might well have bought more securities of its subsidiaries, it in no sense follows that it has unreason-

ably accumulated its gains and profits. Indeed, if it is urged on us that we should have gone out and bought all these securities on this list, I think nothing would follow except that the gains and profits so far as accumulated would then have been in the form of these securities.

Because it seems a by-way and because it seems to me that I detect an attempt to try the case on some issue other than the true one involved, I object to this offer.

The Member: Mr. Pierson, is this top sheet supposed to be a summation of the other sheets?

Mr. Pierson: Yes, that is the summation, Your Honor. Dr. Atkins could probably—

The Member: Yes, but I want you to tell me about this, because if I am to see the significance—

Mr. Pierson: Well, I might state this, Your Honor, that indirect testimony, and this testimony is in the nature of rebuttal—there was testimony to the effect that the bonds of the New Jersey Company were held in large blocks, and that there was very little chance and very little possibility of acquiring those bonds; but that they would have if they could have.

The Member: That is Prince's testimony.

Mr. Pierson: That was Mr. Prince's testimony.

The Member: That is right. What has this got to do with that?

Mr. Pierson: We are offering this in rebuttal, Your Honor.

The Member: Well, I know, but I say how does it show anything?

Mr. Pierson: It shows—

The Member: He has testified that he couldn't get some bonds. Now, are you intending to show that he could have gotten these bonds and didn't?

Mr. Pierson: That if he had wanted to go into the market to acquire these bonds, he could have done so.

The Member: I mean, you are going to show that these bonds—

Mr. Pierson: Were available.

The Member: Were sold to someone else and not to him, not to his company?

Mr. Pierson: But that they were available and could have been purchased.

The Member: Well, are you going to connect it up with something else; are you?

Mr. Pierson: Yes, Your Honor.

The Member: Well, I think I will wait until you do before I permit it to be received. It seems to me that the mere fact that the bonds were bought and sold on the Boston Stock Exchange or to the extent to which they were bought and sold without more is not connected up with the issue in this case, but I am willing to believe that it may be evidence by which it can be connected up, and if and when it is I will entertain a motion to receive it again.

Mr. Pierson: Excuse me a minute.

(Counsel for Respondent confer.)

Mr. Pierson: I will follow that with some further questions, Your Honor, and then I shall make the offer.

The Member: Very well.

Q. 41. (By Mr. Pierson). Had you completed your answer in that regard, Dr. Atkins? A. I must confess that I have lost track of what I said last. Perhaps the Reporter can refresh my memory.

The Member: The last thing you said was that you had prepared a statement of the transactions that occurred on the Boston Stock Exchange, and then this statement was produced.

The Witness: Yes, I think I have completed it.

Q. 42. (By Mr. Pierson). You have completed it to that extent? A. To that extent, yes.

Q. 43. Now, in connection with what you have just testified to, Dr. Atkins, would your investigation indicate that all or a major part of the New Jersey Company bonds were sold on the Boston Stock Exchange? A. My investigation very definitely points to the fact that not all the sales took place on the Boston Stock Exchange, because I found quotations for these securities in the National Bond Quotation Book, and it has been my personal experience, as I stated before, that most types of bonds, and, more specifically, bonds of this sort usually sell in substantially larger volume over-the-counter than they do on the organized exchanges.

Q. 44. Well, what are the reasons for your statement in that regard, Doctor? A. Going back to my personal experience for five years, I was charged with this duty of liquidating the securities, more specifically, bonds owned by insolvent national banks. Those bonds, as I indicated, were shipped into the Federal Reserve Bank in New York to be held in physical safekeeping to be delivered upon my order, and the proceeds collected and remitted to the Comptroller of the Currency. It was my task to find a market for these bonds and determine the conditions of sale. In so doing I established contact with a large number of houses in all parts of the country. Perhaps I should better say a large number of houses in all parts of the country established contact with me, because when it became known, as it did, that this office had been opened for the purpose at hand, brokerage houses, dealers in securities and even individuals came in seeking to buy securities from me.

In determining the sale it was essential, of course, for me to know whether the sale was to take place on a recognized exchange or whether it was to take place over-the-counter. The terms and bases of such sales were predicated

in part upon where the sale took place, and it was on this experience, extending over this five-year period in particular, although the same type of experience was mine when I was with Ames, Emerich & Company, which leads me to state that the major volume of the sales of bonds of this type are made over the counter and not on the organized exchange.

Q. 44½. In connection with your investigation, what did that disclose as to transactions in the bonds of the Maine Company and the Railroad, or the Elevated Company? *A.* The two bonds you have just mentioned are not listed, so far as I know, and hence the transactions in them took place exclusively in the over-the-counter market, and my information in regard to them, therefore, was obtained from this National Quotation Bond Service.

Q. 45. Dr. Atkins, I hand you a book entitled "National Corporation Bonds and Summary," and ask you to state whether or not that is the service to which you have been referring. *A.* That is the service to which I have been referring. This is one of the semi-annual volumes, the issue of January, 1932, which covers the six months' period, the last six months of 1931.

Q. 46. And did you find any quotations therein with regard to the bonds just mentioned? *A.* I have.

Q. 47. Will you state what they are, please?

Mr. Welch: Just a moment. I am quick, if Your Honor please, to recognize things like Poor's or the Financial Chronicle. Perhaps I might be better informed. I know nothing about this book, and I have no confidence in it.

Mr. Pierson: If Your Honor please, I would like you to examine this type of book.

The Member: Well, I do not think this type of book helps any. I do not know any more about it than he does.

Mr. Pierson: I will ask the witness.

Q. 48. (By Mr. Pierson): Will you state what this book contains, from your experience in its use, Dr. Atkins? A. This book I have in my hand is the semi-annual summary of the records covering the securities recorded herein, which were first summarized in monthly summary volumes. The monthly summary volumes are, in turn, a summary of the daily sheets which are published by the National Quotation Bureau, which is its exact title. These daily sheets, they are mimeographed, they are roughly that size (indicating)—

Q. 49. When you say "that size" you are referring to the full— A. Size over the square surface of this. Usually there are anywhere from three or four to eight or ten or more of these published each day and are stapled together, a single line for each entry therein.

The Member: Are they the ones that were referred to in a previous witness' testimony?

The Witness: They are the same ones referred to by Mr. Merriman.

The Member: They deal only with the bid and asked quotations?

The Witness: Yes, sir.

The Member: And do not purport to show the actual sales or the prices; is that correct?

The Witness: That is right, sir.

The Member: And that is what this red book is?

The Witness: This is the semi-annual summary which is made up indirectly from the daily sheets through the monthly summaries.

Now, Mr. Welch has indicated that he is not familiar with this volume. I am sure that if he would ask any dealer or any broker that makes a practice of buying and selling unlisted securities he would find that they are well acquainted with this service. It is indispensable to anyone who is ac-

tively engaged in buying and selling over-the-counter bonds. I won't say over-the-counter securities because the same kind of book is prepared for stocks. This is the bond book and not the stock book.

Mr. Merriman, I think, testified yesterday that these sheets are prepared and distributed to subscribers to this service daily, and from those sheets it is possible to locate at least a substantial number of the houses which are currently interested in either the purchase or sale, or both, of securities listed therein.

I can speak from very intimate experience with this service, because it was my daily companion for five years while I was engaged in selling these bonds. My trainer had it under his hand at all times, and we went over it planning the program for the day. So I had long and intimate experience with the material which is contained in this volume. It is, as Your Honor just stated, a record of the bid and asked prices. It is not a record of the actual sales; but practical experience with these sheets and with this volume has established in my mind very definitely the fact that it is possible to get a rather accurate idea of the volume of transactions, not the exact volume, but a relative idea, which is relatively exact, of the volume of transactions by seeing the number of quotations, the number of houses interested in the security, and the closeness of the bid and asked prices recorded therein.

So far as I know, there is no official record, or unofficial record, of the volume of transactions in unlisted securities published, and this, as far as I know, is the best, if not the only, means of obtaining a reasonably good idea of both the prices and of the activity.

The Member: Mr. Pierson, has your research in the law books disclosed any expression in decisions that throws any

light upon the recognition of the authoritativeness of this publication?

Mr. Pierson: It has not, Your Honor. I have never—

The Member: This is a new place that we are now asked to look for the authoritative data upon bid and asked quotations. I have never heard of it before in any case before the Board, and I want to know. If it is brand new, it seems to me that it takes more than an individual witness' experience in looking at it to test its authoritativeness.

Mr. Pierson: Well, in the light of what the witness has just stated, Your Honor, as to the use which he has made of it as an authority or as a source for the bid and asked price on unlisted bonds, I feel that it has its place as an authority.

The Member: Is that the way you contend to establish an authority, by having one witness say that "I think that if you ask all the people that deal with it, they would agree that it is worth looking at"?

Mr. Pierson: Well, I believe Mr. Merriman, our first witness this morning, testified that he secured—rather, yesterday, testified that he also secured data from that source.

The Member: Oh, yes. I suppose all your witnesses have. I am talking now formally. I have got to deal with this as a matter of evidence and not as a matter of my personal credulousness or incredulousness as to what certain witnesses have to say. If it is authoritative, I want to know why it is authoritative; if it is not authoritative, I do not want to recognize it.

Mr. Pierson: Well, in regard to that, Your Honor, this witness has testified as to his large experience, the use of this book, and the large amount of bonds.

The Member: Yes, but his experience may be wrong. His experience may all have been up the wrong tree. You know that no matter who a witness is, and no matter how respect

able he may be, his say-so does not make a book authoritative. The fact that he likes to read this book rather than some other source in order to ascertain some data does not establish it as an authoritative source for an official proceeding such as this is. I have got to be safe about this. I have got to be assured about it. The place where I look for assurance is amongst counsel who are offering it.

Mr. Pierson: Do I understand that my opponent is still raising the question as to whether or not this is official and recognized?

Mr. Welch: I must give you that appearance.

Mr. Pierson: Well, it is on that basis, Your Honor, that I have attempted to show that this is an official document which is recognized among brokers, to which they turn for official information as regards the bid and asked prices on bonds, unlisted bonds, sold over-the-counter.

The Member: Well, I will sustain the objection.

Mr. Pierson: Exception?

The Member: Yes. I wonder what the Securities and Exchange Commission have to say about this. According to the newspapers, they have been investigating over-the-counter transactions now for some time. Is there any publication which would indicate that this is an authoritative publication?

Mr. Pierson: I do not know at this time, Your Honor, but I think it will be possible to find out from the Interstate Commerce Commission.

The Member: Interstate Commerce Commission?

Mr. Pierson: No. I do not mean the Interstate Commerce Commission. I mean the Securities and Exchange Commission.

7,750. (By Mr. Pierson). Dr. Atkins, from your experience in buying and selling bonds, would you say that it is possible to buy and sell substantial quantities of bonds with-

out unduly affecting the market price for such bonds? A. Yes, sir.

Mr. Welch: Well, I object to that, Your Honor. That might be true of 7,000 bonds and untrue of one bond.

The Member: I will sustain the objection.

Mr. Pierson: I will reframe the question.

Q. 51. (By Mr. Pierson). From your investigation and experience, Dr. Atkins, would you say that you could sell bonds of a par value of, we will say, a million dollars without unduly affecting the market price for such bonds?

Mr. Welch: Objection.

The Member: Sustained.

Q. 52. (By Mr. Pierson). Dr. Atkins, what effect would it have on the market if substantial quantities of bonds were sold—I will change that. What effect would it have on the market if, for instance, a million dollars worth of bonds were sold?

Mr. Welch: Objection.

The Member: Overruled.

A. My answer to that must necessarily be predicated upon the nature and, more specifically, the particular issue of bonds. There are some issues of bonds of which a million could be sold without causing even a ripple on the market at one time, and there are others which it would be rather difficult to sell all at one time.

Another condition which would have an important influence would be whether it is imperative to sell those bonds within a given length of time, or whether it is possible to withhold the sale of those bonds until the market was obtained which was satisfactory. It has been my experience with a large portion of the bonds that if you are not under the compulsion of immediate sale, and the market conditions are reasonably satisfactory, they can be sold without seriously disturbing the market.

I speak much more from my personal experience as special liquidator, where I dealt at times in quite substantial volumes of certain issues of bonds, and obviously I wished to get the best possible market for them. I found that it was possible when the brokers and dealers learned that I was under no compulsion to sell at a particular time, but could withhold that sale until I obtained a market satisfactory to myself, that I was able to move substantial blocks of bonds without depressing the market; and I have observed with Ames, Emerich & Company an accumulation of substantial blocks of bonds under analogous conditions. That is——

The Member: There isn't anything expert about that, is there? Isn't it perfectly common sense, whether you want to buy a house or bonds or anything else, if you are in a position where you have to be patient, you can probably get a better price than if you were in a position where you are in a hurry to consummate the transaction at once? Is there anything expert about that?

The Witness: Why, I do not know exactly how you use the term "expert" there, Your Honor.

The Member: Well, I mean to say, you do not have to sell 25 million dollars worth of securities to get that view, do you, to be aware that that is true?

The Witness: Well, the market is constantly confronted with problems of that kind.

The Member: If you are slow about it and take it easy you can get a more satisfactory market than if you are in a hurry; that is all it comes to, isn't it?

The Witness: Perhaps.

The Member: I do not see, Mr. Pierson, that this leads anywhere. We are taking an awful lot of time getting information that does not help us in either the findings of facts or decision of this case, and there comes a time when, it seems to me, I ought to call a halt.

Mr. Pierson: If Your Honor please, in the presentation of the case I felt that in rebuttal of the testimony which came in from the Petitioner's witnesses as to the availability and whether he could acquire these bonds, it was proper at this place in the case to show that you can acquire bonds on the market through brokers.

The Member: Well, I suppose everybody would adopt that as true, that if the market record of sales indicates that there were sales, that would indicate that there were purchases, and from that I suppose you might infer whether or not, if somebody else bought, whether or not these people could buy. That is a matter of inference, I suppose. But we have got direct evidence that these people tried to buy and were unable to buy. Now, is it enough to overcome that to prove merely that there were sales upon the open market? It may be that one could admit that there were sales upon the open market, and still have it be true, as a matter of fact, that these people tried to buy and were unable to buy. Now, there are all sorts of conditions and circumstances besides a mere market quotation.

Mr. Pierson: Well, as we view it, Your Honor, if they are listed on the Exchange, certainly you can go into the Exchange and buy them.

The Member: Very well. If there is any inference to be drawn, isn't it an inference that the Board must draw in making the findings of fact, and not an inference of so-called expert witnesses? All you need is the fact that there were purchases and sales upon the open market. Now, then, argument is to be made from that, it seems to me, not as an argument by a witness on the witness stand as to what he thinks about it, but an argument made in brief as to what inferences the trier of the case should draw from those facts.

Mr. Pierson: Well, in addition to that, Your Honor, the

Respondent is also attempting to show that in these over-the-counter transactions the method by which he, through his own personal knowledge and experience, found that you can acquire or sell bonds in the over-the-counter market, that is aside from those that are listed on the Exchange; that is, as we view it, it is not only the ones that are actually sold on the Exchange—

The Member: Actually sold?

Mr. Pierson: Actually sold,—that in his experience he has been able to acquire or sell bonds in the over-the-counter market in large numbers, which would indicate, as it seems to us, that these bonds could have been purchased or acquired in that manner.

The Member: Well, I don't know. I should think we should go so far as to show that there were purchases and sales of these bonds, but I don't care whether they are over-the-counter or on the Exchange or anywhere else. Those are the facts, I should think, that you should put in, and the inferences are to be drawn from those facts, not inferences as to whether some one had experience with a thousand bonds, or ten thousand, or 250 million. Those are inferences that must be drawn by the Board.

I do not understand yet the theory upon which this case is all being tried and what this evidence has to do with it. I cannot believe at the moment that Congress intended that this statute should be applied in this way. I do not believe the Government, when it imposes or determines a deficiency under section 104, does it because experts have come to it and said that this corporation or this taxpayer has not acted in accordance with the way the market would indicate that it should have.

Mr. Pierson: Well, in that connection, if Your Honor please, I think that it is perfectly permissible to introduce expert testimony in rebuttal where you are faced with testi-

mony here, where it has been testified by Mr. Prince that he would have bought these securities in large blocks but he could not get them.

The Member: Well, I think you are right. You are right in the introduction of testimony that is a matter of fact, of evidence, and not the introduction of somebody's personal view as to whether this fellow was wise or unwise in places where he went to seek to buy these bonds. You can put in all the testimony you want as to what sales occurred within these taxable years, but these particular bonds, from which you may ask the Board to draw all its inferences as to whether or not we should believe him when he says that he tried and could not buy, certainly his say so as to that is not the last word. We do not have to accept that. We have got to have some factual proof, it seems to me.

Mr. Pierson: If Your Honor please, I have probably not stated it clearly, but it seems to me that it is not opinion testimony necessarily but it runs to this: Mr. Prince testified that these outstanding shares of the New Jersey Company were closely held in large blocks—bonds, I should say, and he would have gotten them if he could.

Now, it seems to me that it is correct to have a witness who is thoroughly familiar with market conditions, and who has dealt in bonds, such as the witness here has dealt in, to show that that is not the correct statement. That is in the nature of rebuttal.

The Member: Well, it is not for the witness to show that that is not a correct statement; it is for you to put in proof from which we may infer that it is not a correct statement. Now, his statement about it is of no consequence at all as to the correctness or incorrectness of the witness' statement of facts that the other witness has put in. What would be and what is of very substantial consequence is what are the facts which show that the witness who testified on the other

side has made a misstatement. In other words, I am not going to stack up the integrity of the witnesses on the one side and the integrity of the witnesses on the other and say, "I like these fellows better than I like the other fellows and therefore I will take what they say." I like to be able to weigh these facts in accordance with what the law is, their evidentiary value, their probative value; and while I may employ this witness to give me some advice if I were to buy some bonds, I do not think that means that this man's mere say-so constitutes evidence with which to rebut the factual data that is in on the other side.

Mr. Pierson: But I think, Your Honor, that he has qualified here to testify as to whether or not under conditions such as this you can acquire bonds.

The Member: I should disagree with that. If you make that proffer I should think I would exclude it, if that is what this witness is being called for to testify about.

Mr. Pierson: If Your Honor please, I make the proffer that this witness will testify with regard to his handling and experience in dealing in large blocks, large quantities of bonds; and that he will further testify that by the handling of large blocks of bonds that he could buy them and sell them on the market without affecting the market price to any degree; that large blocks of—

The Member: That is already in, isn't it, that testimony?

Mr. Pierson: I think he has testified to that extent. I don't know just how far. I have forgotten the record.

The Member: I don't have to rule on that.

Mr. Pierson: That where the bonds of the New Jersey Company were held closely in large blocks by comparatively few holders, that they could still have been purchased by the Maine Company.

The Member: You mean he is going to testify to that cate-

gorically without testifying that there was an attempt made to do so which actually and concretely failed?

Mr. Pierson: Yes, Your Honor, from his experience, that is, bonds of this type and of the Maine Company's bonds.

The Member: All right. I will exclude that, but I won't exclude testimony of an effort made actually to secure these bonds in any large numbers, a real offer, a genuine offer, and a failure to get a taker, if you have evidence like that.

Mr. Pierson: That he will testify that he has had experience in bond dealings where large blocks are held.

The Member: You may put that in.

Mr. Pierson: And that in the light of his experience, his opinion as to whether it would have been possible to purchase substantial quantities of the bonds of the New Jersey Company.

The Member: I will exclude that. I exclude that because I think the evidence of the possibility of purchasing must be evidence of fact and not by the opinion by any one individual.

Mr. Welch: Could I say what is in my mind?

The Member: If you have evidence of his attempt to do so and the failure of the attempt, I will hear the evidence showing that attempt.

Mr. Welch: If Your Honor please, I was considering admitting the proffer in lieu of the actual testimony because of the fact that I consider this such a by-way of the case that it is of little importance any way, and I would like to consider with my assistant as to whether I want any exception outstanding in this by-way of the case.

May I ask, Mr. Pierson, if you would be content to take your proffer of what the witness would testify to as equal to his testimony if I waive objection to it?

Mr. Pierson: No, I would desire to further question the witness in that regard.

Mr. Welch: In that event, having made that rather generous offer, I think I will stand on Your Honor's ruling.

The Member: As I understand, you would not have objected if Mr. Pierson's statement as to his proffer were to be regarded as the evidence?

Mr. Welch: Right.

The Member: But that you do object to the questioning of the witness along the lines that the proffer indicates?

Mr. Welch: Well, it may seem curious—

The Member: To the extent that I have excluded it?

Mr. Welch: We have taken so much time on it, and I consider it so immaterial, that I thought I would be generous to my brother, accept his proffer as evidence and move on to something that I conceive really to have something to do with the case.

The Member: I think that has gone along so long a time in this case that it is hard to know when the door ought to be closed. I confess there have been several days of testimony the significance of which I have grave doubts of because it seems to me that they get a very short distance, if any distance at all, towards helping me to decide the issue in this case under the statute. But I assume that when the Government offers testimony it is because it has had a tremendous amount of experience in this type of case; that it has thought very carefully of the type of evidence that it regards as necessary in order to bring it within the statute, and, therefore, I am very timorous about excluding that, but I confess that after a long period of time in trying to establish a connection between the primary and central issue and the tangential evidence that is offered, I get tired, and I get tired of making that long arc of connection, and perhaps I am getting a little bit impatient about it, but I fail to see the relevancy or the importance of a great deal of the testimony that has gone in along this line.

I may say that it is equally true as to the Petitioner's case.

Mr. Welch: I am aware of that.

The Member: I am also very substantially obstructed in doing what seems to be the reasonable thing to do by reason of the fact that the Board has established a precedent in the acceptance of testimony which has affected the ultimate result in some of these cases so I don't feel in any assured position that I can exclude testimony in this case which has been received in cases which are similar. What I fear is there has come to be established a convention of trying this type of case by a remote evidence process which I doubt will be satisfactory to anybody. We are going further and further afield, it seems to me, in the trial of this type of case.

Mr. Welch: Would Your Honor permit me to say, however, that it would take immense courage as counsel for a taxpayer to stop short of the line of proof that I felt that I should offer? I think Your Honor is right but it takes tremendous courage to try the case on less than the two issues that Your Honor and I both think are not really in the case.

The Member: Well, apparently, it does. It takes more courage than I have to exclude the evidence, and it apparently has happened frequently enough to indicate that it takes more courage than most counsel have in these cases, because there have been a number of them.

I wish there was some way which could be devised whereby from an authoritative source we could get an expression whereby we would know what the reasonable confines of evidence are in an issue of this kind.

I think this is a good time to stop, so we will suspend until 10 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., February 7, 1939, the hearing in the above-entitled case was adjourned.)

[Title omitted.]

EIGHTH DAY.

REPORTER'S MINUTES.

[Filed February 9, 1939.]

Hearing at Washington, D. C., on the 8th day of February, 1939, at 10 o'clock a.m.

The hearing in the above-entitled proceeding was resumed on this the 8th day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

Mr. Pierson: If Your Honor please, at this time I have spoken to Counsel for the Petitioner with respect to adjourning with the Witness Atkins just for a few moments and to put on Mr. Fletcher who will clear up this matter with regard to the National Corporation Bond Summaries to which reference was made yesterday. There will be just a few questions just to show its authenticity.

The Member: Very well.

MR. JOHN L. FLETCHER

called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Pierson). Will you state your name for the record? A. John L. Fletcher.

Q. 2. Where do you live? A. Hackensack, N. J.

Q. 3. What is your position, Mr. Fletcher? A. Secretary of the National Quotations Bureau.

Q. 4. How long have you held this position? A. Since 1913.

Q. 5. What is the business of the National Quotations Bureau? A. Compiling and publishing quotations on over the-counter securities.

Q. 6. How do you obtain the quotations? A. Directly from the dealers by telephone, teletype, hand delivery in New York, and mail.

Q. 7. What publication or publications does the National Quotations Bureau issue? A. Three monthly services and a daily service.

Q. 8. Will you describe what the daily service is and what the monthly service is? A. The daily service is a mimeographed list of all types of unlisted securities arranged alphabetically, subdivided by type of security, showing the name of the broker, his address, and telephone number, and the prices at which he is bidding or offering securities.

Q. 9. Mr. Fletcher, do you make a summary of these daily and monthly publications? A. Our monthly books is a summary of our daily sheets.

Q. 10. I don't know whether you answered this or not, Mr. Fletcher. Will you explain the sources of the data contained in the summary sheets to which you refer? A. All quotations are obtained directly from the brokers.

Q. 11. To whom are these publications distributed? A. To dealers in over-the-counter securities.

Q. 12. And how widely are they distributed? A. The principal dealers throughout the country use our services.

Q. 13. I hand you a book entitled "National Corporation Bond Summary," and ask you if that is one of the books which you publish? A. It is.

Q. 14. And that is the one to which you refer as the summary? A. That is the summary.

Q. 15. Mr. Fletcher, I will ask you whether these summaries are used as an authoritative source of information for over-the-counter transactions in bonds by brokers. I believe you stated—

Mr. Welch: Objection.

The Member: Just a moment. Have you finished the question?

Mr. Pierson: I was going further to add—

Mr. Welch: I beg your pardon.

Mr. Pierson: I was going further to add that I believe the witness had stated that the data compiled was used by brokers.

The Member: Now, what is the question? Read it, please, Mr. Reporter.

(Last question read.)

The Member: I sustain the objection.

Q. 16. (By Mr. Pierson). Mr. Fletcher, have you at any time testified in court relative to over-the-counter quotations in bonds? A. Yes.

Mr. Welch: Objection.

The Member: Overruled.

Q. 17. (By Mr. Pierson). In the course of your testimony in such cases have you referred to the data contained in this National Corporation Bond Summary? A. Yes, I have.

Q. 18. And that is relative to over-the-counter quotations in bonds? A. Yes.

Q. 19. Has this summary been accepted in evidence by the court in such cases?

Mr. Welch: Objection.

The Member: Sustained.

Mr. Pierson: Exception, Your Honor.

The Member: I do not know what your theory is. Is it

that because some courts have accepted it, as this witness says, that makes it authoritative?

Mr. Pierson: I certainly think it does, Your Honor. This witness has testified in court and used this publication, and it was accepted.

The Member: Well, I just asked you what the theory was, and you stated it; so there is no point in hesitating. I made my ruling.

Q. 20. (By Mr. Pierson). In how many cases have you testified, Mr. Fletcher? A. Approximately twenty-five.

Q. 21. And you have used this National Corporation Bond Summary in regard to your testimony in those cases? A. Either that or our daily sheets or our stock summary.

Q. 22. Before what courts have you testified with respect to the data contained in this National Corporation Bond Summary? A. Supreme Court of New York, the Circuit Court of New York, Surrogate's Court—

The Member: What Circuit Court of New York?

The Witness: May I refer to my sheet, please?

(The witness refers to a memorandum.)

The Witness: I should have said the General Sessions Court, the Surrogate's Court of Suffolk County, New York, the Surrogate's Court of Nassau County, New York, the Atlantic County Circuit Court are some of them.

The Member: The Atlantic County Circuit Court?

The Witness: Yes, sir.

The Member: Where is that?

The Witness: Atlantic City.

The Member: Oh.

Mr. Pierson: I now wish to make a proffer for the record of the quotations contained in the National Corporation Bond Summary. It runs from January, 1932, to July, 1932, Volume 36, relative to the bid and asked prices on the bonds of the Chicago Junction Railway Company, which bonds are

stated therein as the Chicago Junction Railway and Union Stock Yards Company 4's of 1940 and the 5's of 1940, and also the Chicago Stock Yards Company collateral trust 5's of October 1, 1961. This proffer is made as being indicative of the determination of the prices at which said bonds were obtainable on the over-the-counter market.

The Member: You are offering the book in evidence, are you? Is that the point?

Mr. Pierson: If I may do that, Your Honor, and then have such pages therein photostated and withdraw them.

The Member: Is there any objection?

Mr. Welch: Just a moment, if Your Honor please. Maybe we had better look at the thing.

(The volume referred to was handed to Mr. Welch.)

Mr. Welch: I have reached the conclusion that my brothers may use it for whatever probative force it may have. I don't object to it.

Mr. Pierson: That is, as I understand you, you don't object to the offering of this book in evidence?

Mr. Welch: I do not, the portion that you offered.

Mr. Pierson: Yes.

The Member: Now, if I understand you correctly, from your last statement, you are not going to offer the whole book but you are going to offer photostatic copies of the pages that you want in?

Mr. Pierson: That is correct, Your Honor. I offer in evidence pages 538 and 539, and page 555 of the National Corporation Bond Summary for January, '32, to July, 1932, Volume 36.

The Member: That will be three sheets, will it not, three photostatic sheets?

Mr. Pierson: That is correct, Your Honor.

The Member: And the Petitioner, as I understand, has no objection to the receipt of them in evidence?

Mr. Welch: That is correct.

The Member: Therefore, we won't mark anything now, because we haven't got anything, but we will hold the Exhibit T raised to the fourth power for this photostatic triple page exhibit, which, as I understand, will be here tomorrow morning, or not later than tomorrow morning?

Mr. Pierson: Yes, Your Honor.

The Member: This afternoon, if possible?

Mr. Pierson: If possible.

The Member: Now, is there anything more that you need from this witness?

Mr. Pierson: No. That is all I have except one more offer.

The Member: Have you anything to cross-examine this witness about?

Mr. Welch: I would like to consider for a moment.

The Member: Make your offer of the next exhibit, then.

Mr. Pierson: I offer in evidence page 523 and page 539, and page 540 of the National Corporation Bond Summary from July, 1931, to January, 1932, Volume 35.

The Member: That also will be a three-page exhibit?

Mr. Pierson: Three pages.

The Member: Photostatic copies?

Mr. Pierson: Yes, Your Honor.

The Member: That is Exhibit four times U.

Mr. Welch: Just one or two questions.

Cross-Examination.

X-Q. 23. (By Mr. Welch). May I ask your name again, sir? *A.* Fletcher.

X-Q. 24. Referring to all quotations in this book, as I understand it, it gives or quotes bid and asked prices for bonds, giving the name of the broker bidding or asking, his address and telephone number; is that right? *A.* That applies more

to our daily sheets. This gives the same information without the address and telephone number.

X-Q. 25. And your daily sheets come out, I assume, the next day, after you learn that some brokers are either buying or offering? *A.* We send them out that night, yes.

X-Q. 26. And you do not report any actual sales? *A.* No, sir.

X-Q. 27. But if I understand you correctly, by looking at the bid and asked prices you think you can make a highly intelligent guess that some sale took place somewhere between the bid and asked price, can't you? *A.* Those prices indicate the prices at which transactions would take place.

X-Q. 28. Yes. My point is this: Anyone as skilled as you could make a highly intelligent guess that some sale took place between the bid and the asked figures, could he not? *A.* Those indicate the prices at which sales would take place.

X-Q. 29. Well, I just want you to answer my question "yes" or "no." It is possible to make a highly intelligent guess that some sale took place at some figure between the bid price and the asked price, isn't it? *A.* That should be the indication of the bid and asked prices.

X-Q. 30. Yes; and also it is possible to make a highly intelligent guess as to the quantity sold, isn't it? *A.* No, sir.

X-Q. 31. You can't even make an intelligent guess as to the quantity sold? *A.* No; I will say not.

Mr. Welch: That is all.

Q. 32. (By the Member). Let me ask you this: You say that you make up these bid and asked quotations from the information which is sent to you by brokers; that is correct, isn't it? *A.* Yes, sir.

Q. 33. What is your arrangement with the broker which makes it reliable that he has sent you all of the bids and asked quotations which he has received each day? *A.* He does not necessarily send us all of his orders.

Q. 34. What does he send you? *A.* He can—he has the privilege of listing ten securities on our sheets for the day with his subscription. He can take out additional subscriptions. He naturally picks out certain securities in which he has orders, listing them in our service.

Q. 35. Now, do you list only the quotations which are sent to you by subscribing brokers? *A.* That is the case with the daily sheets but not with our summaries.

Q. 36. You mean it is not the case with the red book that is before you, for the month? *A.* That is right. The red book contains additional quotations which do not appear on our daily sheets. Brokers who are not subscribers to our daily sheets send us quotations which appear in the summaries.

Q. 37. You mean it just happens that voluntarily they do? *A.* Well, they wish their names to appear under certain securities.

Q. 38. But have you any information about whether there are quotations of brokers which do not appear in this publication? *A.* I don't quite understand your question, but I can assume that—I do assume that a broker may receive orders every day which he does not report to us.

Q. 39. Is it fair to assume that there are some brokers, many or few, as the case may be, who send you no information for your publication? *A.* Yes. There are certain dealers who simply have the privilege of receiving our sheets and not the privilege of listing their own quotations.

Q. 40. Well, I want to know this: Is it true that there are brokers throughout the United States who deal in over-the-counter transactions and who have bids or asks about which you, because of your limitation of your arrangement, would know nothing? *A.* That is true.

Q. 41. And is it true that there are brokers who send

you no information of their bid and asked quotations? A. It is true.

Q. 42. So that your publication does not purport to be a complete statement of the bid and asked quotations of all brokers in the United States in over-the-counter business? A. It could not claim to be complete, no. I don't believe it would be possible to get all such information. I might say that we get our sheets in New York every day, in Chicago every day, and in San Francisco every day; and in that way we fairly cover the country; and we know that it is the most complete service on over-the-counter securities that is published.

Q. 43. Now, is this true, that the primary usefulness of this service, the demand that you hope to supply by publishing this, is to give brokers information which will enable them to complete the other side of the transaction that they are in a position to start, so that if they have a demand price this information will give them a possible purchaser, and if they have an offer price this information will give them a possible seller. Is that the primary function of your publication? A. I would say so. I might say the primary function is to furnish a guide to dealers as to the current markets on many thousands of unlisted securities.

The Member: All right.

Mr. Pierson? That is all, Mr. Fletcher. Thank you.

The Member: Just one more question, Mr. Fletcher.

Q. 44. (By the Member). Is your publication registered with any organizations or any place such as the New York Stock Exchange, or anything of that sort, where it would be officially recognized as giving the information authoritatively and reliably, as it purports to give, or is it merely used by brokers? A. It is merely used by brokers. We couldn't belong to the New York Stock Exchange.

Q. 45. No. Is there any way that it might— A. We are

members of the New York Security Dealers Association, but we have no connection with the New York Stock Exchange, because our publication is on unlisted securities.

Q. 46. New York Security Dealers Association? A. Yes, sir.

Q. 47. Is that an organization of all dealers in stocks and bonds in New York City? A. Probably not all of them but a great majority of the largest dealers.

The Member: All right.

(Witness excused.)

Mr. Pierson: Dr. Atkins, will you resume the stand.

DR. PAUL M. ATKINS

having heretofore been sworn, was recalled to the stand, and was examined and testified as follows:

Mr. Pierson: Your Honor, just to save some time, if I may confer with Counsel for a moment.

The Member: Yes.

(Pause.)

Mr. Pierson: If Your Honor please, I now offer in evidence the sales of the New Jersey Company bonds on the Boston Stock Exchange for the years 1929 to 1933, together with a summary sheet attached thereto, which data is taken from the weekly issues of the Commercial and Financial Chronicle. I understand now that Mr. Welch, my opponent, has no objection to that offer.

The Member: Is that the same paper the offer of which was deferred yesterday?

Mr. Pierson: That is correct, Your Honor.

The Member: It is received.

Mr. Pierson: If Your Honor please, on the front summary sheet there is also contained summaries of the years 1923 to 1938, inclusive, and I am not offering those summaries inasmuch as there is no supporting data or schedule to support that.

The Member: Can the years which are excluded be stricken through so that physically it will appear that they are not to be regarded as a part of the exhibit?

Mr. Pierson: If Your Honor will permit it, I will have this summary sheet retyped eliminating those years therefrom.

The Member: Well, that is preferable.

Mr. Welch: If Your Honor please, we haven't checked it, but it is inconceivable to me that there can be any errors in it, and I think Mr. Pierson will be quick to say that if I find an error it would be a typographical one and it could be corrected.

Mr. Pierson: That is correct.

The Member: You are offering something which you say you are not going to put in evidence. I am talking about this particular sheet. He says he is going to offer the sheet retyped, and eliminate from it the part that he is now proposing to delete. I should think the thing to do would be to defer your offer a little further until you get the sheet that you want to put in evidence.

Mr. Pierson: All right, Your Honor.

Direct Examination (Continued).

Q. 53. (By Mr. Pierson). Dr. Atkins, have you had experience in bond dealings where large blocks were held? *A.* I have.

Q. 54. And closely held? *A.* In some cases, yes.

Q. 55. What has been your experience as to the possibility of acquiring such bonds so held by one who desired to buy them? *A.* My experience has been that it is frequently possible to obtain such blocks of securities. Where a substantial block of securities is held by a single party, usually they are held on what I perhaps could most succinctly term on a strictly investment basis. In other words, they are not held

for sentimental reasons, and are for sale, therefore, if the holder of those securities can obtain a price which he feels is satisfactory. Usually he is eager to get the maximum return commensurate with the risk which he has to assume. In other words, if he can obtain a price fractionally above what he feels he can buy other bonds or other securities carrying the same approximate risk at which he can obtain possibly a lower price for some reason, he will be willing to sell the bonds or the securities which he holds in order to be able to reinvest his funds in others.

Q. 56. Dr. Atkins, in the light of your examination of the stipulation with the exhibits attached thereto, the exhibits introduced by both parties at this hearing, and the other evidence of record in the case, and your special training and experience, have you formed an opinion as to the fair market value of the common stock of New Jersey Company owned by the Maine Company as of December 31, 1930, December 31, 1932, and December 31, 1933? *A.* I have.

Q. 57. Consider for the purpose of your response to the term "fair market value" to mean the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair price, both having reasonable knowledge of the facts, will trade. *A.* I have.

Q. 58. What is your opinion in that regard? *A.* My opinion is that on December 31, 1930, I would value the stock that you have described, on the basis that you have described, in a round figure of $26,600,000;

On December 31, 1932, I would value this same stock on the same basis at $20,700,000;

On December 31, 1933, the same described stock in question, at $22,600,000.

Q. 59. And when you say "value," Dr. Atkins, you mean fair market value? *A.* I mean the fair market value as you have described it.

Q. 60. Will you state your reasons for your opinion in this regard? A. My reasons for these statements are of two general types. One is based on a study, consideration of the various facts in regard to this company, and the related subsidiary and related companies, the information that has been presented in the stipulation and the exhibits attached thereto, and certain exhibits presented in evidence admitted in this case. And in the second place, as a background for forming this opinion, I have given consideration to general economic and business conditions, and the market for securities of other companies which were currently sold on or about these dates in the open market. I have given consideration to the relative position of bonds and stocks as represented by their returns, explanation of which was given yesterday in some detail by Mr. Merriman. And it is on the basis of consideration of these various factors that I have reached the conclusions which I have stated.

Q. 61. Dr. Atkins, you have either heard or read the testimony to the effect that a large accumulation of gains and profits had to be kept by the Maine Company because of the necessity to meet the financial obligation of the New Jersey Company in 1940. A. Yes, sir.

Q. 62. In the light of your experience do you consider this an advisable policy? A. No, sir; I don't feel it to be an advisable policy.

Q. 63. What are your reasons therefor? A. Because I feel that there are other and more satisfactory ways of meeting that situation. It seems to me as though there are two major ways which might be combined in order to deal with the maturities which will take place in 1940.

In the first place, I am convinced from my study of the stipulation, exhibits, and so on, in this case, that it would have been wise for the Maine Company to have purchased a substantial amount of the securities whose maturity

would arrive in 1940 prior to this date. I think that it would have been wise for them to have pursued that policy prior to the years in question at various times. I think it would have been distinctly wise policy to have made purchases during the years in question, at which times the market prices of these securities were decidedly below par, and, as I indicated yesterday, in December 31, 1929, the Maine Company had large liquid resources, a very substantial part of which was in the form of cash, and a further substantial part, so far as I can learn, in the form of general market securities.

It would not have been possible with the resources available during these years to have retired all—purchased all of the securities in question, but I feel that if I had charge of the situation, having pursued that policy, as far as the circumstances would reasonably permit, to plan then to refund the securities that were maturing in 1940, and thus eliminate the necessity of accumulating funds in this way, pay them off in full.

The Member: May I ask you to elucidate what you mean by refunding after you said they couldn't have been purchased?

The Witness: I mean by that to retire, pay off these securities by the issue of new securities from which funds might be obtained for the payment of that portion which had not been acquired.

The Member: You mean the kind that could not have been bought?

The Witness: Where there was not sufficient funds to have bought them during this period.

The Member: Were they callable? Could they have been refunded before their maturity if they couldn't have been purchased?

The Witness: No, Your Honor, not the New Jersey bonds.

They were non-callable, I believe. Apparently I haven't made myself entirely clear.

What I meant to indicate was that I would arrange for their refunding of any amount not purchased at the maturity of the bonds. Have I made myself clear there?

The Member: Well, I think I understand what you say. Do you mean that although the issue would have been outstanding as an issue with some of them not purchaseable because they weren't available for purchase, nevertheless you would have purchased those that you could have purchased and refinanced that part; is that what you mean?

The Witness: And refinance the part which I could not purchase before 1940, in 1940, at the time of the maturity. I am not suggesting to call in the bonds which I understand were non-callable, but what I want to say, trying to say, is that I would have purchased all of the bonds which the circumstances would have made reasonably possible, giving due consideration to all of the various factors, immediate consideration; and the maturities of the bonds which I had not purchased, I would have arranged for their refunding, refinancing at the maturity date.

The Member: At the maturity date?

The Witness: Yes.

The Member: In 1940?

The Witness: In 1940. I would refinance what I could not purchase in the meantime, those I had in my possession.

The Member: Well, you have to refund those if you are going to do anything about it in 1940. You have to pay them. You have to redeem them in 1940, don't you?

The Witness: Yes, sir.

The Member: I don't get the thought about refunding them in 1940 if the corporation is going out of business. It is, isn't it, in 1940? The bonds are going to mature, become

due. I don't understand what is meant by refunding those bonds of the forthcoming extinct corporation.

The Witness: I will see if I can make myself clear in that regard. As I understood the question, it was whether or not I would attempt to accumulate in the treasury of this enterprise sufficient cash funds for 1940 so that when those bonds matured in 1940 I would have sufficient cash in my treasury from the accumulation made up from earnings during this period, reserved for that purpose, a sufficient amount to pay off those bonds, and I indicated that in my opinion I would not attempt to accumulate the full total amount, pay off those bonds at maturity. On the other hand, what I would do would be to purchase currently during this period bonds as they might become available, and as funds might be available to be used for that purpose, as many as I could, giving due consideration to those circumstances, and that in 1940 when the bonds matured I would arrange to pay them off from funds obtained by the issue of new securities.

The Member: Is that all you meant by your expression of refunding the balance?

The Witness: Yes.

The Member: Yes, all right.

The Witness: I think so. That is the result I was trying to obtain.

I. (Continuing.) It seems to me that this procedure which I outlined is a perfectly possible and reasonable procedure to follow, and one which would be to the best interest of the enterprise.

If I may refer to some figures to indicate why I think this would be possible, I find that in the treasury of the New Jersey Company is a block of Indiana Harbor Belt 4's, par value of 2½ million dollars. Upon the payment or refunding of this issue, those bonds will be released and available for disposition, sale.

I also find that on December 31, 1933, there were loans by the Maine Corporation to Mr. Prince, which I understand were liquid loans, and he was presumably in a position to repay, thus placing the Maine Company in funds.

I also find that the Maine Company at that time had cash of $7,500,000. I made reference to the other investments by the Maine Company. Presumably they were general market securities. And I made no reference to any of the other liquid assets of any of the other companies of this group.

The total of those amounts would be, in round figures, 15 million dollars at that time.

I find that maturing in 1940 were 14 million of the New Jersey 4's and 5's.

I find that maturing in 1945, but guaranteed by the New Jersey Company, $2,327,000 of Elevated Railroad bonds, which presumably would demand consideration at that time. And I also give consideration to some other securities, which might or might not demand consideration, depending on the action taken.

The New Jersey Company preferred stock of 6½ million, and Maine bonds of approximately—outstanding in the hands of the public, amount to $3,200,000. And I also put in a figure in excess of $300,000 to represent the value at the approximate market price of the nine dollar guaranteed common stock of the New Jersey Company in the hands of the public, making a total of $26,850,000, in round figures.

Now, one or two courses of action, it seems to me, will be possible: One is to continue the New Jersey Company by procuring a renewal of its charter, which, while obviously not sure at this time, nevertheless seems to me to be a matter which reasonably—a consummation of which might be reasonably contemplated, if it should be desirable.

Mr. Welch: You say should be desirable?

The Witness: If it should be desirable.

Mr. Welch: Yes.

The Witness: No definite bar of the decision is made in that respect.

Mr. Welch: I see.

The Witness: Another possibility would be the elimination of the New Jersey Company and the assumption of its assets and liabilities by the Maine Company.

I confine myself to those possibilities, although I think there are others which might be employed.

If these liquid assets which I referred to were devoted to the retirement of the securities in question and other funds obtained from refunding were obtained to meet the difference, an amount of 12, 15 million dollars might be required. This, it seems to me, would be perfectly reasonable to anticipate, obtaining through a refinancing operation, which, if consummated, would eliminate the debt, the present existing debt, of the New Jersey Company, the Maine Company, the Elevated Company, leaving no debt against them, and making it possible to use the stock of the Transit Company, the Railway Company, and, in addition, if desired, the stock of the Produce Terminal Company and of the Central Manufacturing District as security for obtaining these funds. It does not appear to me as though it would be necessary to use all of these securities as a basis for this refinancing operation.

The Member: Can you tell me briefly what you mean by refinancing?

The Witness: By the sale—I will put it this way: When bonds mature and become due, it is necessary, if the company is to remain solvent, to pay them off. One of the ways in which funds may be obtained for paying off securities that are due is to buy an issue of other securities, from which funds might be obtained. If this is done in collateral or other assets which may have been used to secure this

issue, they are released and become available as securities for the new issue.

The Member: Is that what you mean by refinancing?

The Witness: Yes.

The Member: Now, cannot that be stated, in the layman's language, as substituting new creditors for the old ones?

The Witness: In the layman's language, yes.

The Member: What is the point in that? What is the point of liquidating the debt of A by borrowing money from B to create a debt to B?

The Witness: Because—

The Member: Generally speaking, that is what you mean by refinancing?

The Witness: Yes. That is, Your Honor, constantly being done, particularly in the case of industries of various kinds, where the investment in them is of a relatively permanent character.

We can see that, of course, in—take an illustration from an industry outside of this field, the public utility field, where they constructed a large generating and distributing system for electric power. The expectation is that that system will continue for an indefinite time. Funds to create this system are obtained by the sale of bonds with a maturity of relatively a short number of years as compared with the expected relative durability of the generating and distributing system.

The Member: Well, that is because you are changing the terms of your indebtedness, substituting for a present indebtedness which has terms which you regard as, to some extent, unfavorable, substituting for that an indebtedness with terms that eliminate some of those unfavorable terms, and, on the whole, are regarded as more favorable under the particular circumstances then existing. Is that what you mean to say?

The Witness: No, because from time to time your indebtedness matures at a period when business conditions are such that it is necessary to obtain capital, obtain funds from a new creditor to pay off the ones due the old creditor on terms which are not so favorable as the terms on which the funds were obtained originally. You may better your terms or you may find your terms worse. The terms on which you can obtain your credit will depend on two major factors, the general business and economic situation and the position of the borrowing corporation.

The Member: Yes, but I am talking about the voluntary substitution of one indebtedness for another. You can only do that when the terms of your new indebtedness could be an improvement on the terms of the old.

The Witness: That is true, sir, but here we have a definite date, 1940, when you have no choice in the matter. Your securities mature at that time. You will have to pay them off. I included the Maine bonds in this consideration partly on the assumption that the terms of the indenture, if I remember correctly,—if the New Jersey Company is not kept alive, the maturity of the rest of the bonds, I believe, will be in 1961; and I am including the other Railroad Company bonds in my consideration because they are guaranteed by the New Jersey Company, although they do not mature until 1945. Nevertheless, if the New Jersey Company is to be liquidated then it is necessary to make provision in some way for those bonds.

I have given consideration in my study of this matter primarily to the financial considerations and not to a certain legal consideration as to the best state in which to incorporate, etcetera, and items of that kind.

Mr. Pierson: You may examine.

Mr. Welch: Could I have a copy of the record?

(A copy of the record was handed to the witness.)

Cross-examination.

X-Q. 64. (By Mr. Welch). Dr. Atkins, would you be good enough to turn to page 928 of your testimony? A. Yes, sir.

X-Q. 65. The second full paragraph from the bottom is the one to which I am directing your attention. As I recall it, you began your testimony with a review of the 1929 position— A. Yes, sir.

X-Q. 66. —of this enterprise. You remember that, sir? A. Yes, sir.

X-Q. 67. And you spoke as of December 31, 1929. A. Yes.

X-Q. 68. And you said, on page 928: "I can see no particular reason, therefore, to anticipate as of my date, the 31st of December, 1929, any marked probability of emergency demands being made upon the resources of any of the companies in this group in the immediate future—serious emergency demands." A. Yes.

X-Q. 69. Is it correct, Dr. Atkins, that as of December 31, 1929, you could see no cloud on the horizon? A. May I ask you to define what you mean by "cloud on the horizon"?

X-Q. 70. I will take your own words. Is it true that you could see no marked probability of any emergency demands? A. Not in the case of the immediate affairs of these companies.

X-Q. 71. You just could not see it. Of course, you had in mind as of that date that something pretty bad had happened in the previous October, had you not? A. Yes, sir.

X-Q. 72. And living your life a year or two ahead, using a little hindsight, there were some tough things just ahead, weren't there? A. The general business situation, yes.

X-Q. 73. And tough for this company? A. Situations which the—burdens which the Maine Company decided to assume.

X-Q. 74. Well, tough for the enterprise, let us say. A.

Because the Maine Company definitely assumed burdens which were outside of its normal functions.

X-Q. 75. So that you think the Maine Company assumed burdens outside of its normal functions? *A.* I think so.

X-Q. 76. You do. Well, would you say that it might be a normal function of the Maine Company to keep the enterprise in Chicago going? Is that right? *A.* I want to make certain that I am answering the question.

Read the question again.

(Last question read.)

A. The Maine Company had, I believe, certain reasons for sustaining and helping the subsidiary and allied companies. Does that answer your question?

X-Q. 77. Well, I think so, except I would like you to say to me, as I think you are ready to, that a normal function of the Maine Company would be to keep the enterprise in Chicago running. *A.* Persist in keeping it running?

X-Q. 78. Yes. Not long after this December date of yours, emergency demands did arise, didn't they? *A.* May I ask what emergency demands you are referring to?

X-Q. 79. I am referring to your own words in your testimony. You know what it means since you used them, don't you? *A.* I said that I didn't — if I read here correctly, that I didn't see any marked probability of emergency demands being made upon the resources of any of the companies in this group in the immediate future, serious emergency demands, and now you ask me if emergency demands did not arise, and before I answer I would like to know what you mean by "emergency demands."

X-Q. 80. Just whatever you mean when you used them in your answer to the question. *A.* And also what you mean by the immediate future, how you are defining that.

X-Q. 81. I am defining it as reasonably near future, let's

say the next two or three years. Now, are you fixed so you can answer? A. I think so, yes.

X-Q. 82. All right, let's hear you answer. A. I think there were certain emergency demands of which the Maine Company undertook to assist in meeting.

X-Q. 83. I was interested yesterday in your testimony about the Maine Company being a holding company, and I think, nothing else, is the way you as an expert liked to describe it. A. Yes, sir.

X-Q. 84. Would you be good enough to turn to your notes from which you testified along that line?

Mr. Welch: Could I, without prejudice, glance at these (referring to paperwritings exhibited by the witness)?

Mr. Pierson: Is that—

Mr. Welch: The notes from which he testified.

Mr. Pierson: Well, I see no reason—he has just used that to refresh his memory.

Mr. Welch: Yes, my question is, could I look without prejudice at them.

Mr. Pierson: I object to your looking at them.

Mr. Welch: Then I call for them. I call for them. I have the right to call for them, and I call for them.

(A paperwriting was handed to Mr. Welch by the witness.)

X-Q. 85: (By Mr. Welch). Will you tell me, sir, when you made out these two yellow sheets of notes that I have in my hand from which you testified that in your opinion the Maine Company is a holding company and nothing else? A. When I made them out?

X-Q. 86. Yes. A. I couldn't say the exact date; during the last week or ten days, since I came to Washington.

X-Q. 87. Prior to the opening of the testimony or after the opening of it? A. I think it was probably after the testimony had opened.

X-Q. 88. How soon after? A. Well, I couldn't say. I don't recollect.

X-Q. 89. Now, these are all the sheets that you used in testifying to an opinion that the Maine Company is a holding company and nothing else, aren't they? A. I think those are all the sheets that I used.

X-Q. 90. I don't observe on those sheets any reference to the testimony in the case. Do you? A. No, but I didn't say that was the only information which I used in testifying.

X-Q. 91. I quite understand. Now, will you be good enough to tell us the names of the witnesses whose testimony in the case you considered significant on the question of whether or not the Maine Company is a holding company only? A. I think perhaps I considered the testimony of the analysis presented by Mr. Merriman as having significance.

X-Q. 92. Yes. A. And I think I considered of some significance the testimony of Mr. Prince, possibly, and I really couldn't say which others that I gave consideration to. Let me see if I can think of the names.

X-Q. 93. Let me tell you the names and you tell me or just say "significant" or "insignificant" on this point. Mr. Leonard. Significant or insignificant? A. Some significance.

X-Q. 94. Some significance? A. Yes.

X-Q. 95. Mr. Austin. Significant, insignificant? A. I don't remember the significant points. There may have been, but I don't recall them.

X-Q. 96. Mr. Henkle. Significant, insignificant? A. Possibly of some significance, although I don't have specific recollection of that.

X-Q. 97. Mr. Hackett. Significant, insignificant? A. Possibly of some significance, yes.

X-Q. 98. Some significance? A. Yes.

X-Q. 99. Mr. McDonough. Significant or insignificant? A. I think I would attach some significance to that.

X-Q. 100. Mr. Reimers. Significant or insignificant? A. I don't think I would attach any in that connection.

X-Q. 101. None whatever? A. Not much.

X-Q. 102. Well, let's consider Mr. Reimers just a moment and what he testified to. Will you? A. Yes.

X-Q. 103. Now we are clear that you think his testimony had little significance? A. Well, relatively little, yes.

X-Q. 104. Relatively little? Don't start running away on me, now. I would like to have you stay as close to "little significance" as you will. A. All of these witnesses whose names you have mentioned, if I recollect correctly, made certain statements in regard to the inter-relationships of certain parts, at least, of this organization, and I attach some significance to what they say. Now, I have not given this matter specific thought in an attempt to weigh as to how much significance I would give the testimony of each one of those. You raise this question, and I will therefore—

X-Q. 105. That makes it fun for me, because I can have you do it right now, you see. A. I see.

X-Q. 106. Now, let's compare, if you will for me as an expert the significance you attributed to the tax returns from which you testified— A. Yes.

X-Q. 107. —with the significance you attributed to Mr. Reimers' testimony; which seemed to you much more significant. A. To my mind the information obtained from the tax returns was very much more significant.

X-Q. 108. Yes. Now, do you remember the chief subject about which Mr. Reimers testified? A. He testified with regard to the bank situation, and, more specifically, the conditions under which the Live Stock National Bank, or, possibly, its predecessor, was established and the changes effected there.

X-Q. 109. Do you remember that he testified as to what all the companies did, Mr. Prince and Mr. McDonough said what they should do? Do you remember he said that? A. I am willing to assume that they did if you refresh my memory in that respect.

X-Q. 110. And that the Maine Company issued orders as to when they should do it? A. Once more I am willing to accept your refreshing my memory. I think that is correct.

X-Q. 111. Do you remember that he said that the Maine Company decided what amount should be subordinated in these subordinated deposits? A. I think that is probably correct.

X-Q. 112. And you remember that he testified on what levels they were to be subordinated was decided by the Maine Company? A. I think that is probably correct.

X-Q. 113. You also remember that Mr. Leonard and Mr. Hackett testified that on the bank crisis that was a 10 million dollar affair, they just did what they were told to do by the Maine Company? A. I think that is substantially correct.

X-Q. 114. Now, does that seem to you much less significant on the question of whether the Maine Company is a holding company than these ancient tax returns at which you have looked? A. Yes, sir; I do.

X-Q. 115. Much less significant? A. Very much less, yes.

X-Q. 116. Now, I observed that you made some calculation from some source in tax returns about the percentage of time Mr. Prince spent on different things. A. Yes, sir; I—excuse me. May I correct that? I didn't make any calculations. I copied down some figures which appeared in the tax returns.

X-Q. 117. Yes. And I was a little tired when you were testifying, but I was under the impression that you added it

up in such a way that you reached the 100 percent, so that Mr. Prince had no time to devote to the Maine Company; is that right? A. If I copied these figures correctly, and I believe I have, that is true.

X-Q. 118. That is the result you reached. Now, you realize, of course, that this Maine Company is—oh, what should we say—a 30 million dollar concern? A. If you wish to name it so, yes.

X-Q. 119. Would you say that was a fair rough description of it? A. I would accept it as a rough description.

X-Q. 120. And you realize, of course, that in the year 1930 Mr. Prince owned all its common stock? A. I do.

X-Q. 121. And was the entire owner of that great company and the single enjoyer of its profits? A. That is my understanding.

X-Q. 122. Dr. Atkins, did it strike you as odd at all when your mathematical calculation proved to your satisfaction that he gave no attention to a 30 million dollar concern out of which he got $400,000 a year in dividends? A. I am not certain of that question.

Mr. Welch: May it be read? Let it be read to you if you didn't understand it.

(Question read.)

A. No.

X-Q. 123. (By Mr. Welch). You were satisfied with your mathematical calculation? A. Well, the figures from the income tax returns I find add up to 100 percent.

X-Q. 124. Right. And you drew the conclusion that he had no time to devote to the Maine Company and did devote no time to this huge concern, didn't you? A. I didn't say he devoted no time. His income tax return for that company states on it, in so far as time is concerned, "As required."

X-Q. 125. Yes. "Time as required"? A. Yes.

X-Q. 126. Well, I will pass along from that. Just between

you and me, Dr. Atkins, and as an expert, don't you think he probably devoted just a touch of time now and then to the Maine Company? A. Mr. Welch, I spent a year in the employ of another man holding a holding company and if I am to draw any conclusions from my experience of that kind at that time, it would not surprise me at all that Mr. Prince spent exceedingly little time as president of the Maine Company.

X-Q. 127. Did you hear him testify that after Mr. Sporr's death in 1926 he devoted his whole life to this enterprise? A. I think that he testified to that.

X-Q. 128. Did that seem in any way cogent to you as compared to something you found on a tax return? A. I believe you referred here, didn't you, to the enterprise, meaning thereby the assembly of companies?

X-Q. 129. I am the one that asks the question. If you don't understand the question ask to have it re-read.

Mr. Welch: Will you please have that read?

(Question read.)

X-Q. 130. (By Mr. Welch). I think that can be answered "yes" or "no" without a speech about some other concern you worked for. A. You said something about "enterprise" in the last question. I thought—perhaps I am mistaken.

X-Q. 131. I have had the one read to you that I would like to have you answer. A. I am still a little confused.

Mr. Pierson: That was followed by another question.

The Member: The question that the witness is confused about is not the question that was read. I don't know whether it was the last question or the question before the last, but there was a question in which the word "enterprise" was used. Can you turn to that, Mr. Reporter?

The Reporter: Yes, sir.

(Record read.)

The Member: Now, answer that last question.

A. I am not surprised that he devoted his entire time to the enterprise, for I understand by "enterprise," as it has been used in the testimony in this trial, that it refers not only to the Maine Company but also to the subsidiary and related companies, the entire set-up, and I am not surprised he devoted his time to that, which is in accord with the information I obtained from the tax return.

Mr. Welch: If Your Honor is satisfied with the answer, I am.

The Member: I don't think I have to be satisfied with it.

Mr. Welch: You are the one I am trying to please in the end.

The Member: I will let you be satisfied, or not, as you will, for the time being.

X-Q. 132. (By Mr. Welch). Now, I want you to turn for a moment to Exhibit S-52 attached to the stipulation. Can you find that? *A.* I think so.

X-Q. 133. And Respondent's Exhibit D. I notice that both you and your predecessor on the stand, in talking about surplus, always talked from Exhibit D, did you not? That is what you call the adjusted surplus? *A.* I think that is correct.

X-Q. 134. Now, I would like better talking from Exhibit S-52, which is the surplus as per books. Would it be too much pawing back and forth to compare the surplus per books from S-52 with the surplus, adjusted surplus in Exhibit D, year by year, from '29 through to '33? *A.* I will endeavor to do so. That is the Maine Company. Is there any objection if I put this sheet down below and put the other sheet on top?

X-Q. 135. Oh, goodness, no, anything that helps you. *A.* That top sheet has an Exhibit number stamped on it.

X-Q. 136. Now, will you give the figures to give, giving me first, if you will, the figures as per books from S-52 for 1929 and following it with the same year from Exhibit D? A. I will endeavor to.

X-Q. 137. Go ahead. Will you give them? A. The totals for the years or what figures? These are the balance sheets.

X-Q. 138. The total of the item of surplus. A. Oh, total of item of surplus. Excuse me. The total for surplus on S—

X-Q. 139. 52, is right. A. S52—

X-Q. 140. For '29. A. In other words, that is per books as shown, a surplus of $9,854,485.

X-Q. 141. Let's leave off the dollars. Let's stop at the thousands, don't you think? A. All right, sir.

X-Q. 142. It will serve my purpose. A. Very good.

X-Q. 143. $9,854,000. A. And a capital surplus of a little more than $6,000,

X-Q. 144. No. I want only the $9,800,000 figure. A. I see.

X-Q. 145. And the comparable figure given there is $19,616,000, in round figures.

X-Q. 146. The next year? A. In 1930, according to the books, the figure is given as $12,423,000, in round figures; and, according to the revised balance sheet, it is $22,184,000. You wish me to continue for the succeeding years?

X-Q. 147. If you will, please, right through to '33 only. A. You wish me to omit '31 or include that?

X-Q. 148. Oh, omit it. A. 1932, as per books, surplus of $16,154,000. The surplus, according to the revised balance sheet, $25,915,000. And in 1933, surplus per books of $15,763,000; and, according to the revised balance sheet, $27,759,000.

X-Q. 149. Now, I notice, Dr. Atkins, that every time you or Mr. Merriman refer to an item of surplus you use this Exhibit D; do you not? A. I can't speak for Mr. Merriman, because I did not attempt to check his testimony that closely,

but I think in my studies and my testimony I have referred to Exhibit D.

X-Q. 150. You stated always from Exhibit D because the figures are much larger and sounded much happier to you? *A.* No, sir; I do not. I stated from—

X-Q. 151. I didn't ask you why. I just asked you if that was one reason why. *A.* No, sir.

X-Q. 152. Now, let me consider the item of surplus for a moment. *A.* Very well.

X-Q. 153. That is an item on the liability side, isn't it, of the balance sheet? *A.* It is an item on the liability side, but is not a liability.

X-Q. 154. That is all I have asked you, Doctor. *A.* Yes.

X-Q. 155. We will do better if you just answer my questions. *A.* Very good.

X-Q. 156. Now, dividends are paid out of property, aren't they? *A.* Yes.

X-Q. 157. That is clear, isn't it? *A.* I think so, if I understand your word "property."

X-Q. 158. Yes. And the property that you have available out of which you can declare a dividend is the upper limit of what your dividend may be, is it not? *A.* I would say so.

X-Q. 159. Now, would you take a pencil and set up a little balance sheet for me of a company to whose directors' meeting I am going to take you in a moment. *A.* Do you wish me to use these figures here?

X-Q. 160. No, please. Will you set up a simple little balance sheet for me for a company that you and I are going to run together in a moment? Will you put on the asset side "Cash, $10,000"? *A.* (Witness does as requested.)

X-Q. 161. And put on the asset side, "Plant and Equipment, $1,000,000"? (Witness does as requested.)

X-Q. 162. And will you put on the other side— *A.* Just

a moment, please. I haven't given enough space to write the million.

The Member: I think we had better construct this balance sheet after a few minutes' recess.

(There was a short recess taken.)

X-Q. 163. (By Mr. Welch). How does your balance sheet look now? You have on the asset side, cash, $10,000. *A.* I will have in just a moment, sir.

X-Q. 164. The plant and equipment, a million. *A.* Plant and equipment, a million.

X-Q. 165. On the liability side, capital, $10,000. *A.* Surplus, $1,000,000.

X-Q. 166. Now, with that little balance sheet before you and me as a director, when we meet to declare a dividend, we can't declare our plant and equipment out as a dividend, can we? *A.* Not very well, sir.

X-Q. 167. Now, let us take the same little company, if you will, and go along to a later and happier year and have a little directors' meeting about a dividend; will you? *A.* Yes, sir.

X-Q. 168. Let us assume we sent for our bookkeeper and we say to him, "Mr. Snooks, what are our gains and profits for this year?" And he says, "One million dollars." Will you make a note of that? *A.* These are the gains and profits. Yes.

X-Q. 169. Yes; our bookkeeper just told us we have gains and profits of a million dollars. *A.* Yes, sir.

X-Q. 170. And we say, "Good, Mr. Snooks. How much have we got in the bank?" And he says, "One million dollars." Will you assume that? *A.* In the bank, $1,000,000. Yes.

X-Q. 171. And then we say to him, "Mr. Snooks, how much have we got in surplus?" And he says again, "One million dollars." Will you make a note of that? *A.* Yes.

X-Q. 172. Now, let us assume that you and I say to each other, "We would like to declare a dividend this year. We have got gains and profits of a million dollars; we have got a million dollars in the bank; and we have got a million dollars in our surplus account." If we want to have all we can have, we can declare out a million dollars, can't we? A. So that I shall not be confused, are you setting up a new balance sheet?

X-Q. 173. I am not setting up a new balance sheet. We are in a later year. We have had a splendid year. We have a million dollars in gains and profits; we have a million dollars in the bank; and we have a million dollars in the surplus account. A. We have a million in gains and profits; we have cash in the bank of a million; and we still have a million in surplus

X-Q. 174. Well, I don't care. Put down two million on the side. A. All right.

X-Q. 175. Now, on the basis of your previous question, all you and I can declare out of dividends is our total gains and profits and our total amount of our bank deposit, $1,000,000, isn't it? A. We can declare out our total gains and profits, limited by the total amount in the bank.

X-Q. 176. That is right, yes. A. Yes.

X-Q. 177. Now, let us assume that while we are meeting in our directors' meeting a revenue agent comes in and says to us, "I know how to set up a balance sheet that will show a lot bigger surplus, if you will just give me a Revenue Act and a pencil. I will make your surplus four millions instead of two." Will you assume that? A. Yes, sir.

X-Q. 178. Now, after he has got his pencil and his Revenue Act and his adjusted balance sheet he has not done any magic that will let us declare a bigger dividend, has he? A. Not so far as I know, from what you said.

X-Q. 179. And so, when we deal in this case with surplus,

don't you think it would be fairer to my side of the case if we took the balance sheets per books instead of some funny thing called an adjusted balance sheet? A. No, sir; I do not.

X-Q. 180. You do not think it would be fairer? A. No, sir; for the simple reason—

X-Q. 181. I do not ask you for the reason. Your friends can ask you that. A. Thank you.

X-Q. 182. Now, I want to take up with you quite shortly the dividend policy of this company for the years '30, '32, and '33, and I won't bore us all by going to the meetings, as we did yesterday with Mr. Merriman; but just tell us, if you will, as an expert, what you say this concern should have paid out in the way of a dividend in the year 1930. A. On the basis of the information you gave me?

X-Q. 183. No; I am talking about this Maine Company. A. Oh, excuse me.

X-Q. 184. You remember Mr. Merriman told me what he thought should be declared out as a dividend. Now we have the pleasure of another fine opinion, and I want to know what you think should be declared out. Let us take 1930 first. A. 1930. We are going back and give full consideration to all the facts in the stipulation and so on?

X-Q. 185. Oh, indeed. Oh, indeed. A. I should be inclined to agree rather definitely with Mr. Merriman.

X-Q. 186. Rather definitely? A. Yes.

X-Q. 187. And what is that? A. As I remember correctly, it was approximately 60 percent.

X-Q. 188. Yes. Now, take the next year. What would you do in the next year?

The Member: That, as I recall, was $1,800,000, instead of the $400,000 that was declared.

The Witness: If that is the figure.

The Member: Well, look at the figures before you. I want

to be sure that I understand what you mean by 60 percent, because that is a sort of floating possible percentage. I want to be sure I know just what it is.

The Witness: Yes, it is very approximately that figure.

X-Q. 189. (By Mr. Welch). Now, what will you do for the stockholder in 1931? A. Once more, I would agree with Mr. Merriman and make it approximately 50 percent.

X-Q. 190. Oh, but he did not say that. A. Oh, but I will say that.

X-Q. 191. Fifty percent? A. Fifty percent.

X-Q. 192. Do you remember what he said? A. My recollection is that he gave a figure for the year 1931 of 50 percent.

X-Q. 193. Well, let me tell you what my memory is. He said 50 to 60 percent for 1931. Let us have Mr. Merriman's testimony and make sure we know what we are talking about.

The Member: Well, do you mind if I take this witness for a moment about this percentage? I would like to know whether there is any virtue in your mind in using a percentage figure rather than a dollars figure? To me it would seem that the declaration of the dividend would be first considered in terms of dollars, and after you have decided how many dollars to distribute you would find out, for a statistical or any other purpose, what percentage that is. Commonly, the percentage is declared on the value of the stock and not on the amount of the surplus.

Now, I notice that both Mr. Merriman and you speak in terms of a percentage, and I have ascertained by my own question that the percentage is a percentage of the earnings of that year.

The Witness: Yes, sir.

The Member: Now, am I correct in supposing that your first calculation would be in terms of dollars?

The Witness: Why, my first calculation is to determine in my own mind approximately how much of the net income I was going to declare as a dividend. I, of course, am doing this on the spur of the moment.

The Member: Yes.

The Witness: If I had time I would figure out the rate per share. I don't have the number of shares here. I am doing it in my head.

The Member: You say that first you ascertain the amount of the net income, then you determine how much would be distributed?

The Witness: Yes.

The Member: You would not think in terms of percentages, would you?

The Witness: If a dividend is declared, it will be declared as a round figure, 5, 10, or 25 percent, or 5, 10, or 25 dollars per share, but in trying to reach that I would first find out how much I would pay out altogether and then round it out, sir.

The Member: How much in dollars.

The Witness: Yes.

The Member: That is the thing that would be regarded as a controlling thing to determine.

The Witness: Yes.

The Member: That is what I want to be sure about, because you are speaking in terms of percentages as if that had some virtue in and of itself.

The Witness: It is purely as a matter of convenience, sir.

The Member: Very well.

X-Q. 194. (By Mr. Welch). Now, I am going to skip 1931 for a moment and go to the year 1932. *A.* Yes, sir.

X-Q. 195. What do you, as an expert, say should have been declared out in that year, and I guess my mind is less pre-

cise than His Honor's, for I am content with percentages A. I should say in '32 approximately 50 percent.

X-Q. 196. And in 1933? A. Likewise.

X-Q. 197. Fifty percent? A. Fifty percent.

X-Q. 198. Now, I notice that in '30, '32, and '33 you seem to agree precisely with Mr. Merriman. A. Yes.

X-Q. 199. Now, is that because, as he testified, you have respect for his judgment? A. No.

X-Q. 200. Is it just— A. It is—

X-Q. 201. You said no. Is it just a coincidence that you happen to say 60 in 1930, just as he does; 50 in 1932, just as he does; and 50 in 1933, just as he does? A. I should say it is a coincidence, yes.

X-Q. 202. Just a coincidence; is that right? A. That is right.

X-Q. 203. And I take it, from your point, a happy one? A. I have no objection to that.

X-Q. 204. Is this morning the first time you had fixed your mind on that percentage that should be declared out? A. No.

X-Q. 205. You just told us a moment ago that you had not really considered this previously. A. I made no serious study of this. The question that was brought up was the one I answered in the course of this case.

X-Q. 206. Don't you know that the crux of this case is the amount of dividend outlined by this company in this year? A. My understanding is it is the unreasonable accumulation of gains and profits beyond the needs of the business.

X-Q. 207. Yes, and the accumulation is earnings less dividends? A. Yes.

X-Q. 208. And you know, do you not, Doctor, that what we are talking about now is the absolute crux of this case? A. Well—

X-Q. 209. Just "yes" or "no." A. May I have the question again?

(Last question read.)

The Witness: I understand dividends is the absolute crux of this case.

X-Q. 210. (By Mr. Welch). Well, accumulations is the crux, isn't it? A. I assume that is one of the major points.

X-Q. 211. It is the major point, isn't it? A. I don't know.

X-Q. 212. You don't know. A. No.

X-Q. 213. Well, will you assume with me that it is a major point? A. I agree with that, sir.

X-Q. 214. Will you assume with me that the Government is complaining about this taxpayer because of unreasonable accumulations? A. Yes, sir.

X-Q. 215. Now, you just told me that accumulations are earnings less dividends, did you not? A. If I remember correctly and interpret that correctly, yes.

X-Q. 216. Now, have you any doubt, Doctor, that we are now talking about the crux of this case? A. It seems to me that there are certain other—at least one other point of major importance in this case.

X-Q. 217. Well, O. K. But is this thing we are talking about now of major importance? A. I have already stated that twice.

X-Q. 218. Have you come into the courtroom the second day without having considered this point, which you know is of major importance in this case? A. I considered the point of dividends paid out, if, in my opinion, it was a reasonable distribution of the earnings for that period, and it seemed to me that there was not. I have not given detailed consideration to an attempt to determine exactly how much should be declared.

X-Q. 219. Now, what I want to know, Doctor, let us be

fair with each other. Are you making up your own mind about '30, '32, and '33, or are you deferentially following Mr. Merriman? A. I am making up my own mind.

X-Q. 220. All right. Make up your own mind about the year 1931, will you, please? A. Yes.

X-Q. 221. Make up your own mind and tell us what should be declared out in that year. A. I will say 50 percent.

X-Q. 222. You remember Mr. Merriman said 50 to 60. A. If you say so.

X-Q. 223. I will read it to you. Here is my question, on page 890:

"Now, just one more thing, Mr. Merriman. When we talked about these years '30, '31, '32, and '33, you started saying 60 percent might go out.

"Yes, sir.

"And the next year, in '31, 50 to 60?

"Yes, sir; I think I said 50 to 60."

That was his testimony.

A. All right, sir.

X-Q. 224. Now, you vote this morning for 50? A. Yes.

X-Q. 225. And it is clear that Mr. Merriman voted for 60? A. I think he said 50 to 60.

X-Q. 226. And in dollars that 10 percent variation runs into substantial sums of money, doesn't it? A. Yes.

X-Q. 227. It follows, doesn't it, that men as honorable and as honest as you and Mr. Merriman may have honest differences about dividend policies running into substantial sums of money? A. That is always possible. In 1931—

X-Q. 228. Your answer is "That is always possible," is it not? A. Yes.

X-Q. 229. And that has happened right in the courtroom, hasn't it? A. Apparently.

X-Q. 230. And after all, Dr. Atkins, these things come

down to a question of judgment, don't they—these dividend declarations? A. Yes.

X-Q. 231. And in those tough years from '30 to '33 all directors could do was to meet and look at the clouds and the difficulties and reach an honest judgment of what might reasonably go out of the corporation, wasn't it? A. Yes.

X-Q. 232. I take it, however, you would say to me that an expert like yourself can do a better job than the directors, themselves? A. Under certain conditions, yes.

X-Q. 233. And this is one of those conditions? A. I don't know what the directors did, how often they met, to enable me to answer a question of that kind.

X-Q. 234. Well, you know what dividends they declared, don't you? A. I know what dividends they declared. I don't know what discussion preceded the declaration of those dividends.

X-Q. 235. Well, I said I would not take you through the possible discussions that may have occurred, and I won't. Now, let me turn you to the year 1933, will you, please. A. Yes, sir.

X-Q. 236. And would you look for a moment at your testimony on pages 925 to 930? I don't mean to read it all, but just glance at what you were testifying yesterday. A. 929 and 930?

X-Q. 237. 925 to 930. A. Excuse me.

X-Q. 238. You were discussing the income of the subsidiaries and the extent of the stability in support of your opinion on unreasonable accumulation. Do you remember that you were? A. The first item I see, I was discussing certain assets of the companies.

X-Q. 239. I am not going to examine you closely on what you said. I just want to refresh your recollection as to what you were discussing. A. Yes.

X-Q. 240. Now, all through those pages you discussed the

income of the subsidiaries, did you not? A. Apparently I did.

X-Q. 241. That, of course, is in part because the Maine Company has very little income except such as is pushed out from the subsidiaries? *A.* Yes, sir.

X-Q. 242. Now, I am going to have to ask you to do a little work with the stipulation and with a pad,—I mean the exhibits attached to the stipulation, and I am dealing only with the year 1933, and you are going to have to handle red ink as well as black ink figures. *A.* Yes, sir.

X-Q. 243. Turn first to S-3, will you, please, sir? *A.* Yes.

X-Q. 244. Now, have you before you the income and the expense of the Transit Company for '33? *A.* Yes, sir.

X-Q. 245. What was it, sir? *A.* There were various— which figure on this page do you—

Mr. Welch: May I step into the witness box to point out to him?

The Member: Yes.

X-Q. 246. (By Mr. Welch). What was the result of the Transit Company's operation as per S-3 for the year 1933? A. You refer to this photostated sheet. There is attached here another sheet which—

X-Q. 247. No. I am speaking as per books. *A.* As per books.

X-Q. 248. Yes. *A.* Excuse me, sir. Thank you. In 1933, the total net income, per books, shows a loss of $1,070,000, in round figures.

X-Q. 249. Will you put that down as a loss in that year for the Transit Company? *A.* Yes.

X-Q. 250. Have you got a good strong mark meaning "loss"? *A.* Yes, sir.

X-Q. 251. So I can boast about that later. Now, turn to S-5, Harness & Saddlery. I think there you will find a gain

per books. A. Net income per books in 1930—did you say 30 or 33?

X Q. 252. We are talking about 33 only. A. 33.

X Q. 253. Yes. A. 33 showed a gain of $4,290.

X Q. 254. And select some round figure that is convenient for you to handle. A. All right, sir. Call it $4,000.

X Q. 255. All right. Look at S-8 and do this for me, if you will, on the Railway. A. Railway, net income per books in 1933 was $1,352,000, in round figures.

X Q. 256. What are you going to use? A. I will take $1,352,000.

X Q. 257. Why don't your take $1,350,000? That will do for my purpose. A. All right.

X Q. 258. Now, the Railroad Company, S-12, please always for '33. A. Once more I am confronted with a sheet attached as per books, a photostated sheet for 1933, Railroad shows a loss of $53,590.

X Q. 259. And what will you use as a round figure? A. Fifty four.

X Q. 260. All right. Now, the Produce Terminal, S-24, will you please? A. Produce Terminal Corporation, net income per books for 1933 showed a gain of $29,850.

X Q. 261. And would you use $30,000? A. All right, sir.

X Q. 262. You gave me a break on some odd things a moment ago. Now, turn to the Jersey Company, S-26. A. Yes, sir.

X Q. 263. You will have to do a little sum for me there because I want its net income, if I may, less dividends for subsidiaries. You follow me? A. Will you indicate the columns you are referring to, please?

X Q. 264. That is one there (indicating), and that the other one, you see. A. I see.

X Q. 265. I want its net income disregarding intercorporate dividends, and by that, of course, I mean dividends of

subsidiaries. A. Do you wish me to read off my calculation?

X-Q. 266. If you please, sir. A. Well, I find here in 1933 distributions of $2,900,000, in round figures, and I find net income, in round figures, $2,270,000.

X-Q. 267. Right. A. I have taken the difference between those two and found the difference to be $630,000.

X-Q. 268. And that is a loss, is it not? You observe that that is a loss? A. Yes.

X-Q. 269. So put that $630,000 over on my loss side for me, will you, please?

Mr. Welch: This won't take much longer, Your Honor.

X-Q. 270. (By Mr. Welch). Now, take C. M. D., will you, please, from S-54. A. Excuse me. What is the next?

X-Q. 271. S-54—S-34. I think I have misread this. I beg your pardon. A. Yes, sir.

X-Q. 272. Net income per books— A. Net income per books of Central Manufacturing District trust is shown, in round figures, as $238,000.

X-Q. 273. That is the figure you are taking, sir? A. Yes, sir.

X-Q. 274. Now, we will take up the tiny Central Storage and Forwarding Corporation, on S-36. A. Yes, sir.

X-Q. 275. What do you find? A. It shows a net loss per books of $5,500, in round figures.

X-Q. 276. What do you take that as, fifty-five hundred or five thousand? A. Fifty-five hundred.

X-Q. 277. You will put that down on the loss side, won't you? A. On the loss side, yes.

X-Q. 278. Now, let us pick up the Pau Corporation. That is in S-63, I think. A. Yes.

X-Q. 279. Now, what is it, sir? A. Net income per books in 1933 was a loss, in round figures, of $500.

X-Q. 280. Put it down, if you will. A. Yes.

X-Q. 281. On the loss side. A. Yes.

X-Q. 282. Now we reach the Maine Company, the top company. That you get from S-51. A. S-51?

X-Q. 283. Yes. A. Yes, sir.

X-Q. 284. And I would like to exclude intercorporate dividends again and have the Maine Company's net income stated. A. Once more the precise—

X-Q. 285. It will turn out to be the net income less whatever it received in the way of distributions from subsidiaries. You should find the net income figure at $2,343,840.98. A. Yes, sir.

X-Q. 286. And that it received from its subsidiaries $2,185,460.44. A. Total distributions to the New Jersey Company and Produce Terminal. That is the figure, I believe.

X-Q. 287. Yes. A. Yes.

X-Q. 288. So that exclusive of intercorporate dividends, you get a Maine net income of what? A. A loss of $55,000.

X-Q. 289. I think you are wrong. I think that is a profit of about $58,000. A. Yes. All right.

X-Q. 290. Please be clear, Dr. Atkins,—nobody is going to kick about a mistake in arithmetic. A. Yes.

X-Q. 291. Add it up for me now on both sides, the profits and losses, will you please, sir? A. Well, sir, if my arithmetic is correct, and it is not very well set down here, I find that the gains are, approximately $1,590,000, and the losses, approximately $1,760,000. Is that approximately your figure?

X-Q. 292. Try it again, the gains, and see if they aren't $1,680,000, roughly. A. Yes, that is approximately right.

X-Q. 293. And the net result, then, of the whole enterprise? A. The net result of the whole enterprise is apparently a loss of about $80,000.

X-Q. 294. Now, you know what we have just done, don't you? We have really on the stand and somewhat labori-

ously constructed a consolidated net income picture of the whole enterprise, haven't we? A. As shown by the books.

X-Q. 295. And we have come out with a figure of some $80,000 of loss? A. Yes, sir.

X-Q. 296. Now, let me turn to another matter for a moment. You understand, of course, as an expert that the Maine Company's income is whatever it chooses to have within the limits of what the subsidiaries produce, do you not? A. I should say that is substantially the case.

X-Q. 297. It can order it pushed up or held back as it chooses? A. Yes.

X-Q. 298. And you also know from your study of the case, that in '33 the Maine Company ordered a lot more pushed up than was actually earned in that year, don't you? A. More than what is actually shown on the books here.

X-Q. 299. Right. And that is what I am talking about. A. Yes.

X-Q. 300. I want you to talk about those. A. I am talking about those figures, yes; that you mentioned.

X-Q. 301. Right. Now, when we construct a consolidated net income sheet of the whole enterprise, we find a loss in 1933 of $80,000; don't we? A. According to the figures we have used, yes.

X-Q. 302. And they are accurate, aren't they? They are from the exhibits and from the stipulation and the exhibits attached to it. A. They are accurate in the sense they are from the stipulations, yes.

X-Q. 303. You always assumed that the stipulation was accurate, haven't you? A. I have assumed the stipulation was accurate.

X-Q. 304. Yes. Now, let me ask you this: In a year when the whole enterprise was in the red to the tune of $80,000, do you, as an expert, say that gains and profits were unrea-

sonably accumulated in that year? Just "yes" or "no." A. In spite of the figures that are here—

X-Q. 305. I just said: Will you tell us "yes" or "no" in spite of what I have given you, do you say the gains and profits of the whole enterprise were unreasonably accumulated in that year?

Mr. Pierson: I object to that, Your Honor. These are nothing more than adjusted figures which he has compiled here on the stand. It seems to me it is so far hypothetical we have stipulated the facts in here; and they show what is in the stipulation, and it seems we are getting so far afield that it is objectionable.

The Member: I will overrule the objection.

X-Q. 306. (By Mr. Welch): Do you want that question read again? A. Read it again.

X-Q. 307. Because I would like you to study it sufficiently so you can answer it "yes" or "no."

(Question read.)

A. In spite of the figures that are here, I would say yes.

X-Q. 308. You will say "Yes"? A. Yes.

X-Q. 309. Now, I want to take up with you the single subject that I have left, and that is this question of refinancing in 1940. First, I will ask you if you agree with Dr. Merriman that we ought to get the Jersey Company out of the way? A. I think on the whole that would probably be a reasonable and probably a desirable move, but an unnecessary move.

X-Q. 310. And a what? A. But not a necessary move.

X-Q. 311. Well, it is necessary to take some move, isn't it? A. Oh, yes.

X-Q. 312. You have either got to let it die or prolong it some way? A. I am not entirely convinced that those are the only alternatives.

X-Q. 313. You think there is a third alternative in addition? A. Wait a minute.

X-Q. 314. To let it die or prolong it, do you? A. Yes.

X-Q. 315. Well, tell us this third alternative. I am puzzled. A. I think that another corporation under the laws of another State might be set up to take over the business of the New Jersey Company.

X-Q. 316. In that event, this one dies, doesn't it? A. In this case it does, yes.

X-Q. 317. Well, now, let's not be silly. Aren't there two alternatives: Keep it alive or let it die? A. All right, yes.

X-Q. 318. And not three, as you started to tell me? A. Yes. Very good.

X-Q. 319. All right. Now, let's take the keep-it-alive alternative for a moment. A. Yes.

X-Q. 320. Have you observed what the voting rights of the classes of stock are? A. Yes.

X-Q. 321. Preferred has full voting rights? A. That is my understanding.

X-Q. 322. The Maine Company owns practically none of it to date? A. The dates down to the year 1933, yes.

X-Q. 323. And you know the necessary vote that both classes of stock— A. I believe so.

X-Q. 324. —to extend alike? A. Yes.

X-Q. 325. Well, the Maine Company at the end of '33 was in no position to extend the life of the Jersey Company, was it? Just "yes" or "no." A. Yes, it was.

X-Q. 326. It was? A. Yes.

X-Q. 327. It was by virtue of the fact that it had funds enough to acquire or retire the preferred; is that what you mean? A. No, not necessarily.

X-Q. 328. Do you mean to say that as the holdings of stock stood in 1933 the Maine Company could march into a stockholders' meeting and control the destiny as to whether or not the Jersey Company should be extended? A. Not on the basis of its holdings at that time.

X-Q. 329. And if it controlled the destiny of the Jersey Company in 1940, some more remained to be done between 1933 and 1940; didn't there? A. Yes.

X-Q. 330. And what remained to be done required funds, didn't it? A. In order to prolong the life of the Jersey Company?

X-Q. 331. Yes. A. Not necessarily.

X-Q. 332. Well, funds are required to do something about the preferred in order to control the destiny of the Jersey Company, are they not? A. Not indispensable.

X-Q. 333. Once again you have told me that if the Maine Company marched into the Jersey stockholders' meeting as the situation stood in '33, it could not control the destiny of the Jersey Company; didn't you? A. That is on the holdings of stock as existed.

X-Q. 334. Now, the way to control the destiny of the Jersey Company is to increase the Maine Company's holdings in the stock that may vote when the question comes; is it not? A. That is one way.

X-Q. 335. And that one way takes money? A. That way takes money.

X-Q. 336. I have been questioning you now along the line that money was required to control the destiny of the Jersey Company in 1940 if its life were extended; haven't I? A. Yes.

X-Q. 337. Would you quickly say to me it is preferable to wind up the Jersey Company? You would, wouldn't you? A. It seems to me that of the alternatives it would probably be wiser to but not indispensable to.

X-Q. 338. Wiser? A. Yes.

X-Q. 339. Any director of the Maine Company who planned on liquidating the Jersey Company in 1940 would seem to you a wise director? A. On the basis of the facts as I know them now, yes.

X-Q. 340. Yes. Now, I take it that it is your opinion that as the 1940 crisis approaches it is highly desirable to have a considerable sum of cash available; do you not? A. It is not necessary.

X-Q. 341. I didn't say "not necessary"; I said "highly desirable." A. If I were to go along on my choice, I would say "no."

X-Q. 342. You don't think it is highly desirable to have any cash available as you approach it? A. That wasn't the question.

X-Q. 343. Well, let's start over again. Do you think it desirable that the Maine Company should have in its stock a substantial amount of cash as the 1940 crisis approaches? A. I ask you to define what you mean by "substantial." It is a rather elastic term.

X-Q. 344. Well, you just take any old meaning you would like, the smallest meaning you can possibly apply to "substantial" and tell me if you don't think the Maine Company should have a substantial sum of cash in the sock as 1940 approaches.

Mr. Pierson: I object to that, Your Honor. I think that the question should be put to the witness as to the amounts so that we will know what he means by "substantial."

The Member: Overruled.

Mr. Pierson: Exception.

The Member: If the witness wants to define the word as he uses it, he may do so, because he has been given the utmost latitude to use the word in any sense that he wants to use it. It is only important that we should know in what sense the witness is using the word.

A. Well, if I were to use the word "substantial" in the sense of the amount of cash which was in the treasury of the Maine Company at the close of 1933, I would say I would not think it desirable. If you mean by a substantial amount

of cash an amount sufficient for ample current operations of the company, I would say yes.

X-Q. 345. (By Mr. Welch). So you think— *A.* There is a great difference between those two amounts.

X-Q. 346. To use the vernacular, you think that by the end of 1933 the Maine Company was already too well heeled for the 1940 crisis? *A.* Using the vernacular term is—

X-Q. 347. Well, that may come from Iowa. Let's strike that out. You think that as of the end of 1933 the Maine Company had too much cash as it looked forward to the 1940 crisis? *A.* I will say yes.

X-Q. 348. You will say yes. Now, will you attend a little directors' meeting with me at the end of 1933 while we discuss that? Would you mind that? *A.* I will be delighted.

X-Q. 349. We come in and meet as we did yesterday, and I say, "Dr. Atkins, I just heard on the street that you think we have got too much cash to meet our 1940 crisis; is that right?" And you say "Yes." Let's assume that; will you? *A.* Yes.

X-Q. 350. Let's assume that I say to you, "Doctor, when you said that had you been thinking about the awful tough times we have been going through?" And you said "Yes." Will you assume that? *A.* Yes.

X-Q. 351. And suppose I say to you, "Doctor, how in the world can you tell what 1940 is going to be like, seven years from now?" Will you assume that? *A.* Yes.

X-Q. 352. And will you also assume that I say to you, "Dr. Atkins, I love this company. I want to leave it free of debt in 1940. I have steered my ship by that course since 1911. Won't you consider that as we talk about how much cash we are going to keep?" Will you assume that? *A.* Very well.

X-Q. 353. And suppose I also say to you, "I don't know

how the bankers are going to act in 1940." Will you assume that? A. Very well.

X-Q. 354. And will you also assume that I would say this to you: "Dr. Atkins, I am no one to think. I know if we have got cash to pay our debts we can step up to the counter in 1940 and pay them and we have nothing to worry about." Will you assume that I said that? A. Yes.

X-Q. 355. Now, if after having said all that to you, I stood pat on the proposition that we did not yet have too much cash, would you say, "Mr. Welch, you are just unreasonable"? A. I am to make my answer simply on the assumptions that you have stated to me?

X-Q. 356. Yes. A. And nothing else? Purely a hypothetical question?

X-Q. 357. Yes. A. I would still say yes.

X-Q. 358. You would say I was just unreasonable? A. Yes, on those assumptions.

The Member: It is hard to hear you. What was that last part of the answer?

(Read as follows: "Yes, on those assumptions.")

The Witness: I am answering strictly a hypothetical question.

The Member: Yes, I understand, but I want to hear what you say.

The Witness: Yes, sir.

X-Q. 359. (By Mr. Welch). You insist that it is unreasonable to want as much cash as this concern had in 1930 as it walked down the road toward that crisis in 1940? A. Once more this is strictly a continuation of a hypothetical question? I will say yes.

X-Q. 360. Unreasonable? A. Yes.

X-Q. 361. Now, what you want to do is to arrive in 1940 with some cash and go out some way and borrow the rest that is needed, don't you? A. That is not the entire story.

X-Q. 362. But that is the heart of it? You want to arrive in 1940 with some cash and hope you can go somewhere and borrow the rest, don't you? *A.* That is part of it but you are leaving out to my mind an extremely important part.

X-Q. 363. Well, now, I hope I am not stupid. When the 1940 crisis arrives, plenty of money in some sort is going to be needed, isn't it? *A.* Yes.

X-Q. 364. And you are going down the road with me to meet the crisis, aren't you? *A.* Yes.

X-Q. 365. As I understand you, you want to arrive at the cross-roads with some cash in one hand; that is right? You do, don't you? *A.* Yes.

X-Q. 366. And with the hope in the other hand that by borrowing you can get the additional sum you need; is that right? *A.* I should call it more than a hope.

X-Q. 367. Yes, but maybe I am a little conservative, and I say it is hope. *A.* All right.

X-Q. 368. Now, that is how you want to arrive in 1940; isn't it? *A.* What is more, you are leaving out to my mind some important considerations:

X-Q. 369. Well, I didn't ask you considerations you are going to arrive with. I asked you what you are going to have in one hand and what you are going to have in the other. *A.* All right.

X-Q. 370. Now, in this hand— *A.* You are leaving out certain important assets, then.

X-Q. 371. All right. I am going to give you your head in a moment even if you slay me. In this hand you are going to have cash, aren't you? *A.* Yes.

X-Q. 372. Now, just help yourself and fill up this other hand with hope plus anything you think of. What will you put in your other hand? *A.* I will put in the other hand if I have been able to do what I wanted to do during this period —may I conclude that?

X-Q. 373. Sure. I said I would give you your head. A. I would arrive there with a very substantial part of the outstanding securities which are maturing in 1940.

X-Q. 374. Yes, but if you do that you have got an awful lot less cash over here in my left hand, haven't you? A. Yes.

X-Q. 375. So that doesn't make much sense, does it, Doctor? A. Yes.

X-Q. 376. Suppose we went down the road, you and I together, for 1940, and you had this hand full of Jersey securities instead of cash, and no cash. Do you follow me? A. Yes.

X-Q. 377. Still you would have to have in your right hand a good large gob of hope, wouldn't you? A. Yes, if you phrase your question that way.

X-Q. 378. Now, Doctor, when we sit in our directors' room, and you tell me that you want to go down with a hand full of cash or Jersey securities and another hand full of hope, and I say to you, "Dr. Atkins, let's go down the road with both hands full of cash." A. Yes.

X-Q. 379. Do I just sound utterly unreasonable to you? A. Yes.

X-Q. 380. Now, just one other thing, Doctor. You don't think an industry like this just because it has been in debt for 50 years has always got to be in debt, do you? A. I don't know that it is indispensable, no.

X-Q. 381. It isn't even desirable, is it? A. You used the word "always," did you?

X-Q. 382. Yes. A. I am a little bit concerned over using such an expression as "always." But, if I may, I can see no reason why it should not continue for a considerable period of time with a certain amount of debt advantageously.

X-Q. 383. Let's face the question, Doctor. You don't think it should always remain in debt, do you? A. Using that in

the strict sense of "always" as a limitless time, I would say no.

X-Q. 384. Well, you don't think it should remain in debt another half century, do you, Doctor? A. I see no reason why it shouldn't.

X-Q. 385. But if you owned it—just think along with me—if you owned it and it had been in debt for half a century, wouldn't you feel awfully good if, say, in 1940 you got all of the debts paid? A. Not necessarily.

X-Q. 386. Well, don't you think you would feel better? A. Not necessarily.

X-Q. 387. Now, wait. May I finish the question? A. You may.

X-Q. 388. Don't you think you would feel better in 1940 if you had all the debts paid than you would feel after all the half century you still owed, say, 15 millions of dollars? A. No, sir.

X-Q. 389. So you are just as happy when you are in debt as when you are out of debt; is that right? A. It depends on the circumstances.

X-Q. 390. Yes, but normally speaking you are just as happy when you are in debt as when you are out of debt? A. I can't answer that in general terms. I would say it depends on the circumstances.

X-Q. 391. Do you own a house, Doctor? A. I do not.

X-Q. 392. Suppose you owned a house, just for the moment, and you and your wife and family of whom you are fond lived in it. A. Yes.

X-Q. 393. And that you liked it. A. Yes.

X-Q. 394. And suppose there was a mortgage on it. A. Yes.

X-Q. 395. And suppose it was due in 1940. A. Yes.

X-Q. 396. And suppose you realized you could go down the road to 1940 with cash to pay the mortgage. A. Yes.

X-Q. 397. Or that the alternative was you could go down with just a little cash and hope that you could place the mortgage again. *A.* Yes.

X-Q. 398. Wouldn't you think that it was perfectly reasonable to want to pay your mortgage off in 1940? *A.* Not necessarily.

X-Q. 399. Do you think it would be unreasonable to want to pay off? *A.* That depends on the circumstances.

X-Q. 400. Well, just think of any circumstances you want to, and don't you think that it would be far from unreasonable to have a desire to have your house free of a mortgage? *A.* Not under all circumstances. There are circumstances when I think that would be very desirable.

X-Q. 401. And under those circumstances you would feel kind of good in 1940 if you had the mortgage off of the old homestead, wouldn't you? *A.* Not necessarily.

Mr. Welch: All right. That is all.

Redirect Examination.

Q. 402. (By Mr. Pierson). Dr. Atkins, you were asked on cross-examination with regard to your opinion as to whether the Maine Company was other than a holding company, and in that connection are there any other factors other than those directed to your attention by Mr. Welch as to the reasons why you consider it to be a holding company? *A.* Yes, there are.

Mr. Welch: This is something not brought out on direct that you now wish to add?

Mr. Pierson: Yes, this is redirect.

Mr. Welch: I thought you were going to ask for something that you should normally have brought out on direct and which was not. I don't much care.

Go ahead.

A. As I have examined the facts in this case, it seems to

me that this whole enterprise is in a very large measure the expression of Mr. Prince in various ways. I find that Mr. Prince in the early years was the only stockholder, and later was the important stockholder. The remainder of the stock of the Maine Company was held by F. H. Prince & Company, Inc. That stock, in turn, was held by the Prince trust of which, I believe, Mr. Prince was a trustee, and from which he had proxies to vote the holdings of the stock.

I find that Mr. Prince was president of the Maine Company; that he was president of the New Jersey Company; that he was a chairman of the Board of the Transit Company; that he was president of the Railroad Company; that he was a trustee of the Central Manufacturing District trust; that he was the principal partner in F. H. Prince & Company, the brokerage house. Perhaps he held additional positions as director of some of the other companies. But almost everywhere we turn we find Mr. Prince appearing. When I add to that the relatively small amount of time when Mr. Prince must necessarily have given to the affairs of this company, according to the income tax returns, it seems to me that when the various matters that came up to be decided, they were decided primarily by Mr. Prince as a man, and that he performed the various acts that were necessary to accomplish his desires in whatever position seemed appropriate to perform those acts, and, so far as I can see from this Maine Company, it was a repository of the securities and cash and a source of loans to him and his brokerage house.

When I add all those facts together, I am impressed very definitely that the function of the Maine Company was not managerial in character but was simply that of a holding company.

Mr. Welch: Was Your Honor about to say something?

The Member: I will hear you.

Mr. Welch: I was going to move to strike it on the ground that it is simply a re-hash of what he said on direct, and not appropriate redirect examination.

The Member: Well, I will deny the motion but I admonish counsel to the effect that redirect is not for the purpose of repeating what has been said on direct, and I can take nothing from what the witness has said in his answer which has not already been said on direct. You can't let this go on interminably. We will suspend now until a quarter after two.

(Whereupon, at 12:45 o'clock p. m., a recess was taken until 2:15 o'clock p. m. of the same day.)

AFTERNOON SESSION.

The Division resumed hearings at 2:15 o'clock p. m., whereupon the following proceedings were had:

Mr. Clark: By agreement with Counsel, Your Honor, Mr Merriman will take the stand first relative to the chart.

The Member: Mr. Atkins is still to resume?

Mr. Clark: Yes. Mr. Merriman is most anxious to get a train.

Will you take the stand, please.

MR. NORMAN MERRIMAN

having heretofore been sworn, was recalled to the stand and was examined and testified as follows:

Redirect Examination.

The Witness: If Your Honor please, it might be advantageous if I were to put this chart on this easel.

The Member: This testimony is testimony to be limited to what I started the other day about this exhibit four times R?

Mr. Clark: Well, it is relative, yes, to what Your Honor started at that time. I understand the witness will give evidence as to what it represents.

The Member: Yes, but I mean to say that is the whole content of this testimony?

Mr. Clark: Yes.

The Member: You are not attempting to go beyond that and into something else?

Mr. Clark: Oh, no.

The Member: All right.

Mr. Clark: Unfortunately, this having been prepared so rapidly, we have no copies, but we will have other copies made. Of course, the record shows Mr. Merriman has been previously sworn.

The Member: Oh, yes.

Mr. Clark: May I proceed, Your Honor?

The Member: Yes.

Q. 442. (By Mr. Clark). Mr. Merriman, you prepared this chart? *A.* It was prepared under my direction.

Q. 443. And from what data was it prepared? *A.* It was prepared from data contained in the stipulation. The blue columns—

Q. 444. Just a moment. I just asked you from what data it was prepared. Anything aside from the stipulation? *A.* No, sir.

Q. 445. Now, what does it purport to represent? Just describe it for the Board. *A.* I should amend that. It was prepared from the stipulation and from Exhibit 45, Petitioner's Exhibit 45.

Q. 446. You mean from 45, or with relation to 45? *A.* With relation to 45. The red columns in the chart represent the difference between the red and blue columns which are shown on Petitioner's Exhibit No. 45. Petitioner's Exhibit No. 45 shows the amount of long-term liabilities of the Maine

Company and its subsidiary and affiliated companies. The blue columns represent what, for lack of any better term, I might call the liquid assets. The difference between those two is what I would term the financial problem of the company over and above its cash and other quick assets. That difference has been calculated and has been presented on this chart as the red columns, and in the early years of the period the top of these columns shows that that financial problem that this company must meet or refinance in some way in the future is about $30,000,000.

The Member: Tell me, is this correct, Mr. Merriman, that looking at chart No. 45, the tops, the curve representing the top line of the blue columns of Exhibit No. 45 represent the bottom line of your red columns in the chart you are now considering?

The Witness: Yes, sir.

The Member: Is that correct?

The Witness: That is correct.

The Member: So that this would be a straightened-out line representing the tops of the blue columns?

The Witness: Yes, sir.

Now, the blue columns in this chart represent the annual income of the Maine Company, taken from S-51, and capitalized at 10 percent; in other words, it is the value of that company's income, on the assumption that 10 percent is a proper rate to capitalize it at; so that in the early years of the period this company had a financing problem that, in my judgment, was very great. In the late years of the period the blue columns had risen so high above the red columns that, in my judgment, it meant that the financing problem was not a serious one at all. That is what I endeavored to show in a very hasty way in the chart that was previously introduced into evidence, and it was clear to me although I judge it was not clear to anyone else in the courtroom.

The Member: I am only asking these questions for the purpose of getting clear in my own mind. If I ask anything that either side thinks is objectionable, I trust you will make your objection.

Looking at your Exhibit RRRR, which is the exhibit you offered as part of your testimony the other day, I am a little concerned, puzzled, at least, with the fact that the blue line which you put on Petitioner's Exhibit 45 the other day for the years from 1914 to 1921 is lower than the tops of the blue columns shown on Petitioner's Exhibit 45.

Mr. Clark: Your Honor, may I interrupt?

The Member: Let me finish the question and then before he answers I will let you interrupt all you want to.

While the exhibit you are now considering on the stand before you shows a red column and a blue column, which in each instance of those years is above the line which you have said represents the same line as the tops of the blue columns of Exhibit 45.

You understand what I am referring to? And if you understand it, just say so, and stop before you answer it, and if you don't understand it, then stop. Mr. Clark wants to say something.

The Witness: Might I see this, Your Honor, for a moment?

Mr. Clark: If Your Honor please, my interruption is quite innocuous in character. I was thinking that we hadn't marked this for identification and there is no way of its being identified in the record.

The Member: That is true and perhaps it had better be marked, although I don't think there will be any difficulty about it now because it is the only exhibit we have been talking about since the reconvening after the luncheon recess.

Mr. Clark: I know but there are times when that question comes up.

The Member: Let it be marked.

Mr. Clark: Mark it for identification, and I will offer it later.

The Member: What will that be? Four times V?

The Clerk: WWWW.

The Member: Now, do you understand me, Mr. Merriman?

The Witness: I am not quite sure that I do, Your Honor.

The Member: Well, now, am I correct in my understanding that the exhibit which is now marked WWWW is supposed to portray the same thing, that is, to convey the same ideas to the mind as your Exhibit RRRR?

The Witness: Not exactly but nearly so, Your Honor; nearly so. I endeavored to simplify the exhibit by having only two sets of figures for comparison instead of having three, and, therefore, there is no reference in Exhibit WWWW to the amount of the quick assets that are available to meet this company's ultimate obligations. The only place where they appear is that the length of the red columns in WWWW is the excess of the long-term liabilities over the total of the cash assets which are represented in the blue columns in Petitioner's Exhibit 45.

The Member: Well, now, if you will get over there a minute, so that we can be talking about the same thing. Just look at your column and I am taking this just haphazardly, of 1919. Have you got it?

The Witness: Yes, sir.

The Member: Well, now, the column for 1919 shown on Exhibit 45, and which also appears as the basis of your RRRR shows a red column which gets up to approximately 33 million?

The Witness: Yes, sir.

The Member: And it shows a blue column which gets up to probably 5½ million.

The Witness: Yes, sir.

The Member: And I take it, or I have understood that on your Exhibit WWWW, your red column is accordingly to scale, the length of the difference between the 5 million plus of the blue column of 45, and the approximately 33 million of the red column of 35, or somewhere around 27 or 28 million; is that correct?

The Witness: Yes, sir; that is correct.

The Member: Now, the thing that I am puzzled about is that on your Exhibit RRRR you have a rough blue pencil line which was the purpose of your Exhibit RRRR.

The Witness: Yes, sir.

The Member: Which doesn't even reach into the realm of the excess of the portion of the red line over the portion of the blue line; that is, bar, I mean, column. I can't quite reconcile the theory of WWWW or Exhibit RRRR with what you have said, namely, that it represents only such part as is in excess of the blue column, because on RRRR your red pencil line is below the top of the blue column, so that I would have thought your Exhibit WWWW would show no blue column whatever because there isn't on RRRR which is in excess of the quick assets which are shown on Petitioner's Exhibit 45.

The Witness: Yes, sir.

The Member: That is what puzzled me the other day, and that is what still puzzles me.

The Witness: S-51 for the year 1919 shows that the net income of the Maine Company for that year was $391,000, and, charted on that scale, it is naturally on the scale of it —it is naturally a positive figure. It bears no relationship to the blue column of Exhibit RRRR at all. That is a figure of quick assets, and this is a figure of capitalized income,

and the capitalized income for 1919 shows, as I would read it off the chart, about $400,000, actually—about $4,000,000; actually $3,917,000 on the basis of S-51.

The Member: Something more, Mr. Clark?

Mr. Clark: Nothing with relation to Mr. Merriman, Your Honor.

Do you have something?

Mr. Welch: Maybe.

Recross-Examination.

X-Q. 447. (By Mr. Welch). Mr. Merriman, just one or two questions. You can stay right here. I will be very short.

Mr. Clark: Oh, let me see, Your Honor, at this time offer this in evidence.

The Member: Is there objection?

Mr. Welch: I do not think I should. I think we better have it in.

The Member: It will be marked. We will mark it in a moment as Respondent's Exhibit WWWW, as it is now marked for identification.

X-Q. 448. (By Mr. Welch). I understand this chart, and you will help me if I don't. What you have done, as I understand it, is to make a picture in the red columns of the job that confronted the Maine Company by 1940; is that right? A. Yes, sir.

X-Q. 449. And then, as you thought about the job that confronted you, you made a blue column, which is ten times the earnings of the Maine Company, so that you could look at that as you studied your problem? A. That is exactly it, sir.

X-Q. 450. You heard Dr. Atkins testify this morning, when I had him going down the road with cash in one hand and hope in the other? A. Yes, sir.

X-Q. 451. And I think it is your feeling that if he has

cash in one hand and hope plus your chart in the other he will be even more hopeful; is that right? A. I do not call earning power hope.

X-Q. 452. I know, but that is what you are talking about. You are talking about refinancing. You think a picture of your earning power through the past makes you feel more hopeful about refinancing, don't you? A. More confident.

X-Q. 453. More confident. A. Yes.

X-Q. 454. That is all right.

Now, just one other thing: You heard Dr. Atkins on the stand spell out for us this morning the net income of the enterprise, didn't you, in the year 1933? A. Yes, sir.

X-Q. 455. And that was below zero? A. That method of spelling it out reduced it to less than zero.

X-Q. 456. Now, you have contrasted here the obligations of the parent and the subsidiaries— A. Yes, sir.

X-Q. 457. —on the one hand against the net income of the parent only. A. That is correct, sir.

X-Q. 458. This morning Dr. Atkins constructed for us the net income of the enterprise, you remember, for 1933, and got a zero figure. A. The constructed net income did not give consideration to non-recurring losses, as I understood it.

X-Q. 459. Right. So that if, just in the year 1933, we made a blue column to make us feel hopeful as we went down this road, based on the net income of the enterprise consolidated, we just would not have any blue column at all, would we? A. If we use those book figures, we would not.

Mr. Welch: That is all.

Mr. Clark: That is all.

(Witness excused.)

The Member: Now, will you mark the exhibit.

(The document so offered and received in evidence was

marked "Respondent's Exhibit WWWW," and made a part of this record.)

DR. PAUL M. ATKINS

having heretofore been sworn, was recalled as a witness for the Respondent and was examined and testified as follows:

The Member: Mr. Pierson, the witness is yours, I think.

Mr. Pierson: Yes, Your Honor. I have just one or two more questions and I will finish.

Redirect Examination.

Q. 460. (By Mr. Pierson). Dr. Atkins, in response to Mr. Welch's questions this morning I believe you referred to the fact that you were using Exhibit D rather than S-52. *A.* Yes, sir.

Q. 461. Will you state why you used Respondent's Exhibit D rather than S-52? *A.* Because Exhibit D represents the same material that was contained in another exhibit referred to, corrected to accord with the changes which are stated in the stipulation itself.

Q. 462. From your experience, would you say that the destiny of the New Jersey Company could be controlled without ownership of the preferred stock within the enterprise? *A.* Yes, sir; I would say it could.

Q. 463. Will you state your reason for that answer? *A.* Because I see no reason why it would not be reasonable to anticipate any possibility of acquiring proxies from holders of the preferred stock of the New Jersey Company.

Q. 464. From your experience, Dr. Atkins, how would you think the New Jersey Company could have been refinanced without incurring debt? *A.* I think the New Jersey Company could have been refinanced without incurring debt by an issue of preferred stock.

The Member: You mean in 1940?

The Witness: Yes, sir.

Q. 465. (By Mr. Pierson). I believe you stated in response to Mr. Welch's questions this morning that there was a book loss of, I believe it was, approximately $80,000; is that correct? A. That is correct, sir.

Q. 466. Now, do you consider that the showing of a loss on the books of this amount for 1933 is a fair statement of the results of the operation of the companies in the group for that year?

Mr. Welch: Well, it seems to me that is just so adamant, as a matter of fact, that we have to take it.

The Member: Well, that is argumentative. There is apparently a reasonable question as to whether the books are the criterion for a judgment.

A. No, I don't think that the loss which I computed under Mr. Welch's guidance this morning from the book figures of the incomes of these companies is a sound basis for forming an opinion in regard to the financial position and the true earnings of that group of companies for the year, because I find that there are certain non-recurring losses, which I feel, ascertained in that year, were not due strictly to the operations of that year alone.

I find, for example, the Produce Terminal, there was a loss of what appears to be of that kind, a sum of $311,000, and the Transit Company, another loss, which appears to be of the same type, of $2,213,000, or a total of $2,525,000; and I believe there are other losses of that same type, which I don't have a chance to look up.

Giving consideration, however, to those two items and the figure this morning would give earnings for the group of companies for the year in question to something over $2,400,000, which, to my mind, is representing the true earning power, rather than does the figure of $80,000 loss.

Mr. Pierson: That is all.

Recross-Examination.

X-Q. 467. (By Mr. Welch). Just one little thing. You come from New Jersey, don't you? *A.* Yes, sir.

X-Q. 468. Can you tell us from your experience what it would cost the New Jersey Company in personal property taxes to remain in business with a domiciliary situs in Jersey City? *A.* I cannot say that.

X-Q. 469. Would you have any reason to doubt my statement that it would cost $1,125,000 a year to do that? *A.* It would seem rather excessive.

X-Q. 470. But have you any real reason to doubt it? *A.* Of my own knowledge, no.

Mr. Welch: Nothing further.

Q. 471. (By the Member). I am interested in your statement: You say that the books are not a reliable criterion for appraising the future needs—using it as a basis for the exercise of judgment—for the future conduct of the business; is that correct? *A.* The book figures stated in the exhibits I do not feel are always a sound guide. Testimony has already been introduced in this case indicating that in 1932 there was a large non-recurring item of income, something in excess of $2,000,000, and here in 1933—

Q. 472. Do you mean the re-weighing charge item of the Transit Company? *A.* Yes, sir; taken on the books of that year.

Q. 473. Yes. *A.* And here we have two losses, which, so far as I can learn, are not regularly recurring losses which were ascertained and entered on the books. I do not mean in any sense to infer that the books were not accurately and properly kept, but from the point of view of forming an opinion with regard to the earning power of the corporation, I feel it is necessary to give consideration only to the normal and regular expenditures and sources of income.

Q. 474. Now, that is what you said, I thought, in answer to Mr. Pierson's question just a minute or so ago, but in addition to that, you said that not only were there two non-recurring losses which you found, and this non-recurring gain which you found, but you said something to intimate that you thought there might be other non-recurring items which you had not yet been able to identify. Am I correct in that? *A.* Well, I mean to intimate that simply in the time that I had this morning I had not an opportunity to search the record to ascertain whether there are or not.

Q. 475. Well, I want to know whether your view that the books are not a reliable criterion for judgment is based upon the three items which you have expressly enumerated of non-recurring amount whether on the loss or the gain side, or whether it is based upon those three items which you did find, and a thought that there are perhaps other items which you didn't find. *A.* Well, now, I am not entirely certain that I thoroughly understand your question here. I am dealing here with—

Q. 476. I will have to make it clear again: I am speaking only with regard to your answer to Mr. Pierson, and if I misunderstood that answer then everything that I am saying now has no foundation, but I did understand you to say, I thought, that there were not only two non-recurring loss items, and one non-recurring gain item, but that there were other non-recurring items or possibly other items which in the short time you had to give to it you had not been able to ascertain. *A.* Yes, sir.

Q. 477. Now, if your thinking is predicated upon a possibility of errors in the books or bad theory in the books which is to be found elsewhere than in the three items you have enumerated, it is important that we should know what it is that forms the predicate for your feeling that the

books are not the proper place to go for the ascertainment of the data upon which the directors or your own judgment is as to future conduct should be predicated. A. May I clear up those—try to clear up those questions step by step, perhaps not in the same order?

In the first place, in regard to the keeping of the books according to sound theory and in an accurate manner, I have no question whatsoever in regard to the accuracy of the books or in regard to the soundness of the theory on which those books were kept. But from my experience, I believe, that oftentimes it is necessary to seek in the books the information which is needed for specific purposes. The same information is not always in the same form for the same purposes.

Let me take an illustration entirely aside from this case. Suppose, for example, that a loss was sustained in the year 1935, which was not ascertained in the exact amount until the year 1936, and was not taken into the books until 1936 of that company. It is a loss which has to be written down. One way would be to charge it directly against the surplus of the company and not show it in the operations of the year 1936. Another way would be to show it in the operation of '36 and so take it into a surplus. If we are studying the operations of this hypothetical company, it would depend on what purpose we wanted to use that information for which figure we would take. And that seems to me that in the case consideration has been given, on one hand, to the book figures as they stand without adjustment for two items which need consideration in determining the figures for the use which I had in mind when I made my statement. I do not know of any items which appear here, and these are the only two items that I have given any consideration to. I simply wanted to—there might be some other items that I don't know of because of the lack of

time, that I didn't give any consideration to them. It is just simply that I don't like to say "never" until I have had plenty of time to be absolutely sure as to the matter, Your Honor, but these items are two which I have been giving consideration to.

Is that—

Q. 478. Does the possibility that there are other nonrecurring items which have not come to your notice in the short time which you have had influence your judgment? *A.* No, sir; because I think the probability of other items is of no significance at all. It is so small that it would not affect my judgment in the matter.

Q. 479. You have no lurking reason for supposing that there are other items which should be accounted for or which would form a reason for your discounting the face value of the figures, have you? *A.* No, sir.

Mr. Pierson: That is all. Thank you.

Mr. Welch: Just one moment. I still have one other question. I think Mr. Green will tell me not to ask it.

(Mr. Welch and Mr. Green confer.)

Mr. Welch: I have gotten the forbidden negative that I expected.

The Member: You may stand aside.

(Witness excused.)

Mr. Clark: Dr. Friday, will you please take the stand.

DR. DAVID FRIDAY

called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Clark). Will you state your full name.

The Member: Perhaps I might suggest, Dr. Friday has been on the witness stand before the Board, and, more

particularly, before this division of the Board in the proceedings in which I have presided. I have heard his qualifications stated at great length, so that I, myself, am familiar with the witness' history. I suggest that only for the purpose of shortening the qualifications, if the Petitioner's Counsel are not insistent upon a full statement of them again. But that is merely a suggesting of a way of shortening it, and I shouldn't use any pressure at all to insist upon its being done.

Mr. Clark: We are approaching the end, Your Honor, and I think we all want to get through.

Mr. Welch: I will make it still shorter, if you will tell me what points his opinion will be offered for, I will no doubt quickly admit his qualifications.

Mr. Clark: Whether this is a holding or investment company. When I say "this" I mean the Maine Company. Whether it accumulated gains or profits during these particular years beyond the reasonable needs of the business. He will testify as to the fair market value of the New Jersey Company common stock which was held by the Maine Company in 1930, '32, and '33, and then give an opinion as to the advisability of the Maine Company accumulating a large amount of gains and profits for the retirement of the New Jersey Company bonds in 1940.

Mr. Welch: That sounds like No. 2 over again, which was accumulating beyond the reasonable needs.

Mr. Clark: Well—

Mr. Welch: In any event, I admit his qualifications.

The Member: I suppose if anybody wants to know his qualifications he can look in the transcript of the testimony before the Board in five or six cases, Dr. Friday, in which you have stated them?

The Witness: Yes, sir.

The Member: What cases are they?

The Witness: My first—

The Member: The First was the Couzens case?

The Witness: The first was the Couzens case in 1927. The next one of consequence was the Bok estate, Edward Bok estate involving the valuation of the Curtiss Publishing Company. The next after that was—there were two cases in which I testified for the Government, the Hoover Vacuum Cleaner—the Hoover estate valuing the estate of the Hoover Vacuum Cleaner stock. That was in the spring of '37. And in the spring of '38 the Maytag Company stock valuation for gift tax purposes. I have testified within the last month as to the value of the stock in the Philadelphia Enquirer, a Philadelphia newspaper, that is. The Emerald Coal case.

The Member: What case was the Philadelphia Enquirer case? Do you know the name of the case?

The Witness: I believe it was Philadelphia Enquirer Corporation against the Commissioner.

The Emerald Coal case, which was a year ago.

The Member: That was the Walker Estate case?

The Witness: That was the Walker Estate case; yes, sir. And the W. C. Rand case. That was about '35, as I remember it.

The Member: Some of those cases you have testified as an expert witness for the Government, and in others you have testified as an expert witness for the taxpayer; isn't that true?

The Witness: Yes, sir; two of them for the Government and the others for the taxpayer.

The Reporter: I don't believe we have your name yet.

The Witness: David Friday, and I reside at 4525 Garfield Street, Washington, D. C.

Q. 2. (By Mr. Clark). When did you first start an examination or start preparation for testifying in this case?

A. Some time early in December or late in November.

Q. 3. That was at my request? *A.* That was at your request; yes, sir.

Q. 4. Now, pursuant to that request, have you examined and your preparation in general—have you examined the stipulation of the facts and the exhibits attached thereto which have been filed with the Board in this case? *A.* Yes, sir; I have.

Q. 5. And examined the exhibits which have been introduced at the hearing by Petitioner and Respondent? *A.* I have, sir.

Q. 6. I don't suppose that you mean by that that you have gone through every line, but you have given consideration and cursory examination or such general and thorough examination as you thought proper? *A.* I have gone through the exhibits of the plaintiff pretty thoroughly line by line and a good deal of the other material.

Q. 7. You haven't been here at all the days of the hearing, but have you either heard the evidence or read the transcript of the record as to the testimony which has been introduced here? *A.* Yes, most of it. I think there are two or three of the witnesses for the plaintiff that I have not read.

Q. 8. Do you recall what witnesses those are? *A.* Mr. Donovan or Mr. McDonough. Which one is the assistant to Mr. Prince? I read his but I did not get time to read the other gentleman's.

Q. 9. Mr. McDonough, I think.

Mr. Welch: It is apparently Mr. Donovan that he did not read.

Mr. Clark: Oh, Mr. Donovan.

The Witness: Mr. Donovan.

Q. 10. (By Mr. Clark). Now, in the light of all this, and your special training and experience, have you an opinion

as to whether in the years, '32, and '33 the Maine Company was a mere holding or investment company?

Mr. Welch: I object. That is the familiar ground. I think I should object and I assume that I will be overruled.

The Member: I will overrule the objection.

Mr. Welch: And save my exception, please.

The Member: Re-expressing my doubt as to the efficacy of the testimony to be of any persuasive weight upon the issue. You may answer.

A. I am of the opinion that it is a mere holding or investment company.

Q. H. Well, now, will you state your reasons for arriving at that conclusion? A. Well, in going over such evidence as I have been able to gather on the matter, it appears to me that the only function of the Chicago Stock Yards Company, the Maine Company, that is, was to own stock, particularly the stock of the New Jersey Company, to receive dividends, to invest particularly those dividends in other securities, to receive the interests on those securities, and, in a general way, to manage the income from those securities in the acquisition of other securities. And that appeared to me, as I viewed the evidence, to be the function of the company.

I looked into the income tax return, particularly the consolidated returns of the New Jersey Company, and found the re—the several witnesses for the plaintiff have testified to it—that Mr. Prince was very active in these various subsidiary companies. And I saw among other things stated there over the signature of whoever made the return of this rather surprising fact, that he spent 58 percent of his time in one and 42 in the others, and part of his time in another, and such time as needed in the other. I didn't try to add that up. But it indicated very clearly that Mr. Prince was active in the whole of these stock yards com-

panies, and I knew of his activities in other fields. I have met him in the field in which he was interested.

I believe a company such as the company might have a research organization which devoted itself to accounting and statistical analysis and other problems with respect to the stock yards industry. It is a live stock industry and a very large industry. I know something about it. I was president of an agricultural college for two years. But pretty definitely, such work as was done there was done by Mr. Prince. That is, in stating here, in the survey of the pay roll of the company, he gets $50,000, and the treasurer gets five hundred, and there are two thousand dollars worth of other employees. From that I saw nothing to indicate that they were engaged in any activities other than those activities of holding and administering these stocks and revenues. And I formed the opinion that that was a holding or investment company.

Q. 12. Anything further you have to add? *A.* No, that is all I have to say about that.

Q. 13. Now, similarly, have you formed an opinion as to whether in these same years the Maine Company accumulated gains and profits beyond the reasonable needs of the business? *A.* Yes.

Q. 14. And what is that opinion? *A.* My opinion is that they did.

Q. 15. Will you state the reasons which led you to that opinion? *A.* Well, I studied this whole situation with all these figures of income and assets accumulated, and cash accumulated. I have listened to the testimony and read most of it. And it is clear that in trying to ascertain what are the reasonable needs, the thing that seems to be at the very center of the problem is what are the reasonable needs of the Maine Company, particularly in view of a

situation that it has—of these situations that it has confronting it in 1940.

It has been repeated here over and over that in 1940 the charter of the New Jersey Company expires, the bonds fall due. There are 14 millions of them. There are some $2,327,000 of Railroad bonds that the New Jersey Company guarantees the principal and the interest. They will have to be taken care of, and when the charter expires there are preferred stockholders entitled to receive $6,500,000 upon dissolution or sale or the customary phrase that is contained in the preferred stocks. That Mr. Prince is desirous of retaining control of this whole stock yards situation together with the Chicago Junction Railroad situation, and since because that is the chief source of his income, and of the income of the Maine Company, and since that is true, he naturally concerns himself certainly as an individual with the smooth handling of that management of that situation in 1940 in order that no untoward event may befall these companies or this industry.

Now, what are the reasonable needs of the company? What are the reasonable needs of the company in view of that? That is the way in which the question presented itself to my mind. The problem presented itself to my mind. I studied these figures and studied particularly this Respondent's Exhibit C, I believe, in which are set forth for the entire enterprise. I think that is right, isn't it? Respondent's Exhibit C? Behind the famous chart.

Mr. Welch: The basis of 45?

The Witness: Yes, sir.

A. (Continuing) Studied that and analyzed it and I got some help from that, I thought, on the problem. And there are set forth, first of all, the liquid assets of all these corporations, the Maine Company, and the New Jersey Company, and all their subsidiaries, and we have set forth in

that exhibit their cash, their notes receivable, their marketable securities, and we have also set forth the bonds and the debentures which all of the different companies combined own, the preferred stocks which are outstanding, and common stocks which are outstanding. That chart runs back to 1911.

I have taken off a tabulation here from this for convenience. Perhaps we ought to offer this in evidence? It would be more convenient to follow the tabulation, if I take this short tabulation, and follow it. This was prepared from (handing a paperwriting to Mr. Clark)—

The Member: Have you finished that sentence?

The Witness: I thought—

The Member: You said "This was prepared from —" and you stopped.

The Witness: This was prepared from Exhibit C, the figures appearing thereon.

The Member: Entirely?

The Witness: Entirely.

Mr. Welch: He seems to have left off of it the preferred stock of the New Jersey Company and the common stock, the requirements to retire that.

The Witness: Yes, sir. I was going to explain the situation. I thought this might help in elucidating it.

Mr. Welch: Certainly. I want to keep nothing from His Honor that will help a clear understanding of the case. I suggest that this be handed up to His Honor to follow as a chart, and if Your Honor would like it in evidence, it certainly should be in if you think it is a help. It is to be used as a chart of what the witness says.

4. (Continuing) On this tabulation there is set down in the first column a statement of the volume of bonds and debentures of the Maine Company and all the subsidiaries of this enterprise year by year. Those are merely bonds and

debentures and it does not contain the preferred stock of the New Jersey Company nor the common stock of any of the companies. These are the debts of the company that most of—most of it must be met in 1940.

And in the second column, cash, notes receivables, and investments of Maine Company and subsidiaries are set down, the assets as they appear in the exhibit, the liquid assets which may be and are either actual funds for use in the payment of the bond obligations when they become due, or assets which might quickly be converted into liquid funds. I also set down for convenience in the third column the actual cash. That is the part of the second column which consists of cash. That is set down in the third column.

I studied this chart particularly as of 1929. I may say that the whole of this tabulation discloses the dividend policy of the company in years gone by, to accumulate assets and liquidate assets in very considerable amount.

By 1929 there were outstanding at the end of the year bonds and debentures totaling $23,963,000, in various stages, but most of them due in 1940. The most that the company had accumulated and had on hand was $19,691,661 of liquidating assets, of which $11,510,000 were in cash.

The question that I asked myself at that point was whether at the end of 1929, which is the year just before 1930, the first year with which we are here concerned, there was an accumulation of liquid assets which met the reasonable needs of this business, the reasonable needs, as I gathered, being determined very largely by the fact that in 1940 a large number of these bonds became due, and the evident feeling that has been manifested here that at that time the New Jersey Company should be liquidated.

I have not found much difference of opinion among any of the witnesses. I have read their testimony on this point,

and I am in agreement that it should be liquidated in 1940. I am also of the opinion that it is not necessary that it should be liquidated in the sense that the company of that name should go out of existence; the charter might be renewed and extended; but in my opinion it would be best that it be liquidated.

Now, on the question as to what are the reasonable needs of the business, in view of that situation particularly, to me it appeared that at the end of 1929 the reasonable needs of this business for this purpose, for the emergency that confronted it in 1940, permitted the declaration of much larger dividends than any that had been declared theretofore, back to 1924, as I remember it, since which time they had declared 5 percent, or $400,000 a year; and that it was not necessary in 1930 to retain the amount that was retained in that year. The year 1930 had net income for the Maine Company of $2,968,363. Out of that the company declared $400,000 and the rest remained in the industry. That seemed to me to be retaining assets and earnings beyond the reasonable needs of the company, in view of what those needs were.

Now, I considered the matter thoroughly and decided that the most that could be set up, in my opinion, as reasonable needs was an amount which would enable the Maine Company to liquidate these bonds and debentures and pay the debts of the company in 1940, and that would require that $23,963,000, as is shown in the first column, that between 1930 and 1940 certain of the bonds that were outstanding here would have been paid off, particularly the Chicago Manufacturing District bonds, which are serial bonds, and, as I remember, the serial bonds would have extinguished this completely by 1940. But taking this figure of $23,963,000, if the company has that much money on hand in 1940, or assets which can be completely converted into money,

then it can pay them off, in which event the collateral behind these 14 million dollar face value of bonds of the New Jersey Company would be released. Now, that collateral consists of the entire stock, as I remember it, of the Chicago Stock Yards and Transit Company and also of the entire stock of the Railway Company, which owns the lease, owns the road, and which also owns the lease to the New York Central, which yields $2,000,000 a year, all told. Such an item of collateral, free and clear of the debt, and yielding the income that it does, the company would not have the slightest difficulty at all in obtaining financing in the Maine Company with which to take care of the preferred stock, which only amounts to $6,500,000, and with which to redeem such common stock as may still be outstanding at that time. The difficulty or the needs that confronted the company during the years, from the standpoint of making a smooth transition from the old organization into the new one, this company would be kept intact without any embarrassment of any kind.

So, it appeared to me that the needs for the ten years from 1930 to 1939, in preparation for 1940 were rather moderate, and that the retention of the amount of earnings, such as was retained in 1930 and '32, was beyond the reasonable needs of the business.

Q. 16. (By Mr. Clark). Now, in view of your examination of the stipulation and the evidence, exhibits, which you have testified, you have examined, and your special training and experience, have you formed an opinion as to the fair market value of the New Jersey Company's common stock, which is owned by the Maine Company, at December 31, of 1930, '32, and '33?

Now, in answering that you may consider the term "fair market value" to mean the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair

price, both having reasonable knowledge of the facts of the trade.

Do you have such an opinion? A. Yes, sir; I have.

Q. 17. Well, now, what is that opinion for each of the respective years? A. My opinion is that the value of the stock, including the whole interest in the New Jersey Company, which the Maine Company enjoys because of its contract from 1911 to 1914 with respect to its rights, and the net income available for the common stock of the New Jersey Company, that the value of the common stock of the New Jersey Company, at the end of 1930, was $22,742,160; and that the value of the stock with which the Jersey Company held, including in that value all the values that it has, the contract of the New Jersey Company with the Maine Company, which was owned by the Maine Company, is $22,292,160.

Q. 18. Now, will you state to the Board the reasons which lead you to that conclusion? A. What I did in arriving at the value was simply this: I scanned the earnings of the New Jersey Company for previous years, arriving at some figure of what earnings were in prospect for the common stock of the New Jersey Company in 1930.

I took the nine years previous—that is, I took the nine years beginning with 1922 and ending in 1930 of the New Jersey—nine years from 1922 to 1930, inclusive, for the New Jersey Company. During those nine years the average earnings for stocks, preferred and common, were $2,664,216. That was after deducting bond interest of 4 percent on the $4,000,000 and 5 percent on the $10,000,000, or the other way around, whichever it is.

I computed the bond interest on the bonds and after deducting $2,264,216 of money available for preferred and common stock. The preferred stock calls for $390,000 of dividends, $6 dividends, 6½ million of preferred, taking

that out leaves $2,274,216 of net income for the common stock. This common stock I capitalized at ten times the income; that is, at 10 percent. That gave the $22,742,160 for all of the stock.

Of this stock the New Jersey Company itself owned about 60,000 shares during these years in question, and approximately 5,000 shares are not owned by the New Jersey Company but are outstanding in the hands of the public, or were during these years. These 5,000 shares that are not owned by the New Jersey Company are entitled to a nine dollar dividend guaranteed by the Maine Company. If you take out the $45,000 of dividends, of which the 5,000 shares of common stock outstanding are in the hands of the public, from the net income available for all the common stock, as I have given it, there remains $2,229,216 of net income for the stock owned by the New Jersey Company.

Q. 19. Just a minute. You say owned by the New Jersey Company. Are you quite sure? *A.* Of the Maine Company. Of the New Jersey Company, owned by the Maine Company.

Q. 20. When you speak of 60,000 shares, you mean owned by the Maine Company? *A.* Owned by the Maine Company, yes.

That shows at the rate of 10 percent at the rate of capitalization, which would be, of course, a difficult problem. What I did in that matter, I studied various corporations, all those that I could think of, and with whose records I had any acquaintance and scanned the records of various publications, such as Moody's and the Commercial and Financial Chronicle, and various corporations that were comparable to this, studied their actions in relation to stock and net income during the depression.

In view of the fact that the two million dollars of this net income flows from the lease of the Railroad to the New York Central, and in view of the fact that that had been

a remarkably stable income—in fact, it might be considered guaranteed stock—it was practically in the class of guaranteed stock—I looked in the railroad field, and I thought of the Norfolk & Western as one which had a stable income during the depression; also Chesapeake & Ohio; Union Pacific, and the cases of those three stocks I found this, that in 1932 they were selling at the end of the year at a price which was equal to ten times their net earnings—in 1930, I should have said. In 1932 they were selling at nine times; 1933, in fact, at eleven times. Preferred guaranteed stocks, such as Pittsburgh, Fort Wayne & Chicago, Susquehanna, sold at a much higher price, relative to their earnings, than this. In fact, the figure was an average of eighteen times earnings in 1930, fourteen and a half times earnings in 1932, and fifteen and seven-tenths earnings in 1933. I did not, however, accept those. I kept to the more moderate and large and well known stocks.

I studied a number of other industrial stocks that were fairly stable, Allied Chemical & Dye, American Can, Homestead Mining; Beechnut Packing, which was in the food business, and had shown a remarkable record; Coca-Cola; General Mills, a flour milling company; Great Atlantic & Pacific Tea Company, a merchandise company; Quaker Oats. Taking all of these stocks together, railroads, guaranteed and not guaranteed, and these more stable food products, you get a relation of the value of the stock to the earnings in 1930 of 13.4; in 1932, of 12.28, and in 1933 of 14.45. I took ten times for 1932—ten times for 1930, nine times for 1932, and ten times again for 1933.

In 1932, the ten year average earnings for 1923 to 1932, after deducting the bond interest and the preferred stock dividends, was $2,222,495. I valued that nine times earnings, which gives the value for the entire stock of the New Jersey Company, of $20,002,455, and for the stock owned

by the Maine Company—that is, the stock of the New Jersey Company owned by the Maine Company—of $19,687,455. In 1933 the ten years, 1924 to 1933—that is, the ten years ending with 1933, the best indication of probable earnings for the future,—the yield was $2,103,868 for the common stock.

The Member: We will suspend for a few minutes. (There was a short recess taken.)

Q. 21: (By Mr. Clark). Do you recall where you were, Mr. Bixby? A. Yes, sir. I think I had just stated that the average net earnings available for common stock of the New Jersey Company for the ten years 1924 to 1933, inclusive, were $2,103,868 a year, after deducting the dividend on preferred stock.

I valued that by capitalizing it at 10 percent, or, putting it the other way around, at ten times earnings, and the value was $21,038,680; that is the value of the entire 65,000 shares of stock on that basis, deducting $45,000 from the net income of $2,103,868, that being the dividend, guaranteed dividends, and the 5,000 of common outstanding, which left the difference between those two sums for the stock that was owned by the Maine Company. It does not seem to be computed here.

May I be excused for just a moment while I compute it?

Deducting $45,000 required for the guaranteed dividend on the common stock, I arrive at a figure of $2,058,868 that remains available for the common stock of the New Jersey Company held by the Maine Company, valuing that at ten times earnings, which makes $20,588,680 for the New Jersey stock owned by the Maine Company at the end of 1933.

Mr. Clark: Is there any objection to this going in? Is this the original?

The Member: I have the original.

Mr. Clark: Well, I offer the original, Your Honor.

The Member: In order that the record might be quite clear, you are now offering as Exhibit XXXX the summation which the witness said that he prepared from Exhibit C?

Mr. Clark: That is my recollection.

The Member. Is that correct?

Mr. Welch: Yes.

The Member: I mean, I want the record to describe just what this Exhibit XXXX is.

That is the one you are talking about? That is the only exhibit you have prepared so far, is it?

The Witness: Yes, sir.

The Member: About which there has been any talk at all?

The Witness: Yes, sir.

The Member: Very well.

Mr. Clark: I have no further questions, Your Honor.

(The document so offered and received in evidence was marked "Respondent's Exhibit XXXX," and made a part of this record.)

Cross-Examination.

X-Q. 22. (By Mr. Welch). Dr. Friday, I have a feeling that you and I are going to be friends; and in any event I hope we are going to be short, because I have a burning ambition to bring the evidence to a close today.

Have you before you a copy of Exhibit XXXX, is it, the last one marked? A. Yes, sir.

X-Q. 23. Thank you.

First, I want just to say a word about your testimony in respect to the Maine Company being a mere holding company. Are you aware, Doctor, that you are the first witness that has used the word "mere" holding company? A. I was not, no.

X-Q. 24. If my memory is accurate, you are the first.

Do you know the definition of "mere," Doctor? Just "yes" or "no." A. I will say "yes."

X-Q. 25. Will you accept this definition, which I read in the dictionary, "Nothing else but?" A. Yes.

X-Q. 26. That is a good one, isn't it? A. Yes.

X-Q. 27. That is right out of the dictionary.

Now, Doctor, all of us are pretty proud of that Railway lease, aren't we, in this case? A. Yes.

X-Q. 28. Now, did you hear Mr. Prince say how he spent about three years negotiating that lease? A. I read it; yes, sir.

X-Q. 29. And you remember that at that time he was not an officer of the Railway Company or the Transit Company? A. That is correct.

X-Q. 30. Now, during the three years that Mr. Prince was working on that gorgeous lease, working on behalf of the Maine Company, which is the only company of which he was an officer, would you say that the Maine Company was nothing else but a holding company during those three years? A. Yes.

X-Q. 31. You would? A. Yes.

May I give my reasons for it?

X-Q. 32. No. I have not asked you. You might have fun with me if I asked you the reasons.

Now, Doctor, I am not going to take you all through that, but when Mr. Prince and Mr. McDonough go out to Chicago after a fire and decide what to rebuild, would you say that the Maine Company is nothing else but a holding company? A. Yes, that evidence wouldn't modify—

X-Q. 33. O. K. And you have heard us talk about this bank crisis, haven't you? A. Yes, sir.

X-Q. 34. When the Maine Company moved right in on the ground and ran the show? You have heard that testimony, haven't you? A. Yes, sir.

X-Q. 35. While the Maine Company ran that show, as I just put it to you, would you say, Doctor, in fairness to me, that the Maine Company was nothing but a holding company? A. I think I ought to tell you, Mr. Welch—

X-Q. 36. Oh, no, Just answer it for me. You may just be bursting with things to tell me, but would you say it was nothing else but a holding company on that occasion? A. Well, on that occasion it was the one time when I saw clear evidence of its doing—engaging in some business activity outside of holding.

X-Q. 37. Well, thank you, Doctor. And that is right in the period we are talking about, isn't it? A. Yes, sir.

X-Q. 38. And that is one time it looked to you as if it was something else but, didn't it? A. Yes, it engaged in activity.

X-Q. 39. Thanks again.

Now, Doctor, let's take this Exhibit XXXX. That is what you worked out from Mr. Green's figures? A. Yes, sir.

X-Q. 40. Now, curiously enough, Doctor, I don't know that I should say this to you, but all of a sudden we are trying the case on the ground that I thought we might originally try it.

You observe from this exhibit, do you not, Doctor, that the Maine Company never got enough together to meet the debts of the enterprise, did it? A. In liquid assets?

X-Q. 41. Right. That is what I mean. A. Right. Yes, sir.

X-Q. 42. And that is leaving aside the preferred stock not yet dealt with? A. That is correct.

X-Q. 43. Leaving aside the common stock which must still be dealt with some way, but what remains outstanding, the common stock of the Jersey Company still not acquired. A. Yes, if any remains outstanding.

X-Q. 44. Yes.

Doctor, in fairness to me, isn't it somewhat difficult to

say that the unreasonable accumulations have begun until you at least have got enough to meet those hard grinding debts? A. No, it doesn't seem to me.

X-Q. 45. It doesn't seem so? A. No, sir. It is 10 years yet, you know.

X-Q. 46. I know, but those ten years are a blank, you know. In '33 we don't know what they will do to us, do we, Doctor? A. Oh, we never do.

X-Q. 47. And we just have a series of years that have hit us awfully hard. You remember that? A. Yes.

X-Q. 48. So that do you think if you and I met in the directors' meeting, as I have had the other witnesses meet, and I said to you, "Doctor, we have never got enough together yet to pay the debts to say nothing of the preferred and the common that is outstanding, and we have been through such tough times, I think we ought to kind of hang on," would you look across the table and say, "Welch, I think you are unreasonable?" A. Well, I don't know that I would say, "Welch, I think you are unreasonable." I would say you couldn't justify this as a reasonable need.

X-Q. 49. I didn't put it to you that way. A. That is the way—that is my way of looking at it.

X-Q. 50. You know how I like to play the little game. I say to you, "Doctor, we haven't got enough yet to pay our debts to say nothing of this preferred and common and we have been through some tough years, and '40 is a long ways away. I think we ought not to declare out too much."

My question is a simple one. Would you say to me, "Welch, you are just unreasonable?" A. Certainly not. Certainly you are a reasonable man.

X-Q. 51. That is all I meant. These are problems where honest men can differ, can't they? A. Yes, absolutely.

X-Q. 52. And they are difficult problems, aren't they, Doctor? A. Yes, sir.

X-Q. 53. Doctor, will you do one other thing for me? You will need your pencil. Take the year 1929, at the end of the year '29 on Exhibit XXXX. Take your first two columns and tell us, if you will, how much additional accumulations the Maine Company indulged itself in in that four-year period? *A.* Towards paying off its debts? From '29 to '33?

X-Q. 54. Yes. *A.* You mean the movement of the cash and the—

X-Q. 55. That is right. *A.* That is right.

X-Q. 56. There is some shrinkage and some changes in the cash and the liquid assets. I just want to see how much closer together they were at the end of the four-year period than they were at the beginning. *A.* Oh, yes.

The Member: You mean the movement from 19 million up to 22 million as against the 23 million debt? Is that your problem?

Mr. Welch: I am taking 23 million debt in '29—

The Member: Yes.

Mr. Welch: And 21 million debt at the end of '33, and contrasting with those two figures 19 millions of this cash, notes receivable, investments in '29 and 17 millions at the end and to see what the change is, what the variation is between the two figures at the end. *A.* In 1929, the outstanding bonds and debentures exceeded the liquid assets by $4,271,339; and in 1933, they exceeded them by only $3,367,031.

X-Q. 57. (By Mr. Welch). And the difference between those two figures? *A.* The difference between those two figures is, $904,308.

X-Q. 58. Well, I get a little different figure, but let's assume you are right.

Then, Doctor, in four years' time that gap between the debts on the one hand and the cash, the notes receivable,

and so forth, on the other—that gap had been closed only to the extent of $900,000; hadn't it? A. That is correct.

X-Q. 59. That is not a very shocking rate of accumulating, is it, Doctor? A. No.

X-Q. 60. Now, Doctor, let's do it quickly, if we can. His Honor doesn't quite like the percentages, but it will make for speed.

What percentage of the earnings would you in your judgment have declared out as a dividend in the year 1930? A. Well, I wouldn't—I hadn't thought about the percentages. I thought about it rather in reasonable needs of this company as I saw them as a stockholder.

X-Q. 61. Didn't you think about it this morning when I was pressing Dr. Atkins on his opinion? A. About what? About the percentages?

X-Q. 62. Yes. A. Yes. I thought that the percentage wasn't a very pertinent basis on which to handle the thing.

X-Q. 63. Well, you see, your prior experts have set a bad example for you, so I have no choice except to make you follow along. A. Well, I will have to compute it. I will have to tell you what I would have done and then compute the percentage afterward.

I would have said, "Here we are"—

X-Q. 64. Don't make a speech. Just tell me what dividend you would have declared. A. Oh, yes.

X-Q. 65. And then give me your percentage of earnings. A. Well, I would have declared $2,100,000.

X-Q. 66. In what year? A. In 1930.

X-Q. 67. That is what percentage of the earnings? Roughly will do. A. Well, this is just under $3,000,000. That is a little over 70 percent.

X-Q. 68. Thank you.

In 1930 you take out 70 percent.

The next year? A. The next year—in 1932, is this?

X-Q. 69. Let's take '31. A. '31. 1931. '31 I would have declared $1,800,000.

X-Q. 70. Which is roughly what percent? A. Considerably over two-thirds, about 68 or 69.

X-Q. 71. I will take 69 because I like it.

Give me '32, will you? A. '32—

X-Q. 72. First the figure. A. Yes. '32 I would have declared $1,200,000.

X-Q. 73. Which is, roughly, what percent of earning? A. Percents have nothing to do with my getting at this figure.

X-Q. 74. Yes, I know. A. Somewhat less than 60, I guess.

X-Q. 75. Just under 60? A. No, I think it is a trifle under 60.

X-Q. 76. Well, let's have it. A. Just a bit over 55, as a matter of fact.

X-Q. 77. Just a little over 55? A. Yes, sir.

X-Q. 78. O. K. The next one. A. 1933. In 1933 I would have declared over $800,000.

X-Q. 79. Which is, roughly? A. Thirty-three percent.

X-Q. 80. Thirty-three percent.

Dr. Friday, you realize, of course, that if you had declared out those sums, you would have widened this gap on Exhibit XXXX? A. Yes, sir.

X-Q. 81. And started back down the hill again with a gap widening on you? A. Yes, sir.

X-Q. 82. That seems sound and wise to you, to turn around and start widening the gap again after all these years of narrowing it? A. Well, these were years of depression, and one can't expect to go on accumulating things for the payment of debts in those years.

X-Q. 83. Well now, Doctor, it might be, you know, that that is one of the years you should be careful. Hadn't that occurred to you? A. That doesn't seem reasonable to me.

X-Q. 84. I see. And in the tough depression years you

are less careful about your cash than in the gaudy, prosperous years; is that right, Doctor? A. No.

X-Q. 85. Well, I thought that was what you said. A. It isn't right, no. It isn't right.

X-Q. 86. Well, let's try it again.

Don't you think the process of narrowing this gap on Exhibit XXXX ought to have been continued as it had all through the history of the company and not reversed so that you again start to widen it? A. Let me say you are overlooking one thing. This isn't all we did. We bought some stock of the Jersey Company, too, during this period.

X-Q. 87. I know, but that is a side issue, Doctor. You know, you are telling me now when you are going to declare out these dividends that you are going to widen this gap on Exhibit XXXX. A. In these years; yes, sir; I would have done that.

X-Q. 88. And then you are going to widen the gap right in the years of the depression, aren't you? A. Yes, sir.

X-Q. 89. And now if you can go with me, Doctor, I want you to in all honesty. A. Yes, sir.

X-Q. 90. In those awful tough years, is that the time to reverse your policy and start widening that gap again after all those years of trying to close it? A. Oh, that isn't what you do. You are not going about it to widen the gap. That is not the only consideration of corporate policy to widen the gap for meeting a debt 10 years hence.

X-Q. 91. I quite know that, but the inevitable result of these dividend declarations that you sit here and recommend to us is widening that gap; isn't it, Doctor? A. Yes, sir.

X-Q. 92. Now, your history all up to 1929 had been one of narrowing the gap; hasn't it? A. Yes, during a period of remarkable prosperity.

X-Q. 93. Right. Now, after you climb the hill and got it

pretty narrow, I understand you to say that in a time of depression let's turn around and start widening it again; is that right? A. Oh, no, that is not what I say.

X-Q. 94. That is the result of your— A. The considerations that govern the payment of dividend are quite other than that.

X-Q. 95. I will pass it. There may be a whole variety of things that govern it, Doctor.

Now, do you notice that you seem to differ from your learned associates as to the amount of these dividends? A. That may well be.

X-Q. 96. You do notice it, don't you? A. Yes, I notice it. Surely, I notice it.

X-Q. 97. And you differ in the amounts that run into very serious sums of money in any man's language, don't you? A. Yes, sir.

X-Q. 98. Well, it follows, doesn't it, Doctor, that honest, honorable men can have the gravest differences on these dividend policies, doesn't it? A. Yes, sir.

X-Q. 99. And as long as a fellow acts honestly and with the best information he can get, it is not easy to quarrel with him, is it, Doctor? A. No.

X-Q. 100. Did you hear my series of questions this morning of Dr. Atkins when I went down the road with cash in one hand and hope in the other? A. Yes, sir.

X-Q. 101. Would you have answered all that line of questions as he answered them? A. I don't—I would have to go over them again.

X-Q. 102. Well, just think back. You heard it all. Would you have answered that line of questions as he answered them? A. Well, I would really have to know what you are talking about. I think I wouldn't. I think probably I would not.

X-Q. 103. That is what I thought.

And another thing, Doctor: You remember I asked him if he thought a company once in debt ought always to remain in debt? You remember my asking that? A. Yes, I remember it, yes.

X-Q. 104. You will go along with me when I suggest to you that it is honorable to get out of debt, won't you? A. Yes, sir.

X-Q. 105. And a man running an enterprise with an ambition to leave it some day debt free is to be applauded, isn't he? A. Yes.

X-Q. 106. There is no doubt about it, is there? A. There isn't any doubt about it in my mind. It is a laudable ambition.

X-Q. 107. So far as Mr. Prince may have had a plan to leave this enterprise at the time he must leave us, too, free of debt, and in a strong position, you would applaud that plan, wouldn't you, Doctor? A. Yes, sir. I might. The distinction is, it is honorable but not necessary. That is the big point.

X-Q. 108. I know, but it is all on the sound side, isn't it? A. Oh, certainly. It is perfectly honorable. I would applaud it.

Mr. Welch: I think that is all, Doctor.

Redirect Examination.

Q. 109. (By Mr. Clark). Reference was made on cross-examination, Dr. Friday, to the activity of the Maine Company during the bank emergency, and you stated that that was one instance in which there was some business activity on the part of the Maine Company, as I recall. A. Well, it is not clear evidence of the Maine Company stepping out and indulging with its funds in an activity, which in my judgment was purely holding.

Q. 110. Does that affect your opinion that it was a mere

holding or investment company? A. Not by and large; no, sir; because it wasn't regularly in that business. That is not a business. Here was an emergency confronting them as it has confronted all of us. Most people never in their lifetimes have seen a depression before, a major depression, certainly not such a bank depression, and the Maine Company was availed of to go with the rest of the companies in this group for the purpose of doing what seemed wise to Mr. Prince in Chicago.

Mr. Clark: That is all.

Mr. Welch: That is all, Doctor.

The Member: Doctor, I want to ask you one question.

Q. 111. (By the Member). Getting back to these percentages that you seem to abhore equally with me, you say that an amount which approximated 70 percent of the income of 1930— A. Yes, sir.

Q. 112. —would in your opinion have more wisely been distributed than to have withheld it, is that correct? Would have been wiser? A. Well, what I was—what I meant was wise in this sense, that it could have corresponded, as I analyze the problem, to the reasonable needs of a policy—

Q. 113. That left 30 percent unexpended? A. Yes, sir.

Q. 114. Am I to understand you as having the opinion, then, that any withholding of distribution of income in excess of 30 percent in that year was beyond the reasonable needs of the business? A. Any excess beyond what I have there, $800,000 odd, yes.

Q. 115. Whatever the amounts are. I was using the 70 percent only because that was what remained in my mind of the figures. A. Yes.

Q. 116. You mean you left an amount— A. That is correct.

Q. 117. And as I understand you, you would say that the amount which you left was the top, the maximum limit

which would have been within the reasonable needs of the business, so that the amount in excess of that being withheld was a withholding or an accumulation in excess of the reasonable needs of the business? I am trying to say the same thing that you said in another way in order to find out that that was what you meant. A. I am not sure that I would go quite so strong as to the language to say that was the very maximum. There might be difference of opinion. But over a small range—but the objective to which I would have directed my calculations; that is about what I would come to on the board as one of the board of directors.

I would have said, "Well, now, you mean to say you have got $19,700,000 here in cash? What is it about? You say we are going to have this crisis in about '40. That is 10 years away. You have only to meet 23 million of debts. $500,000 a year withheld could cover that and take care of some contingencies besides."

Now, I took $2,950,000—I chose $2,100,000 for one reason because it comes to a straight percentage on the stock although I think I miscalculated on that perhaps, and some sum around $750,000, which would allow for some contingencies and would accumulate us an amount of this cash, liquid assets which would enable us to go on down the street with the money in our hand, pay off the debts, and give us back the collateral, and the collateral is worth a lot of money. That is the lease, and all of the Transit stock. And thereafter we could have sat down and presented them to an investment bank and just waited for the public to bid for whatever securities we were generous enough to issue them at all to clear up this preferred stock. It seems that is all the reasonable needs there was there.

Q. 118. Can you give me any idea of the extent of elasticity in the amount which should have been withheld or might have been reasonably withheld in excess of which or

the excess over which would be beyond the reasonable needs of the business, whether the variation would be in terms of a few thousand dollars or in terms of a few hundred thousand dollars, or what it would be? A. In the year 1930, and my decision allowed $850,000, I should think that was as high as you could go, in my judgment.

Q. 119. Well, that is what I understand is what you said, the way I interpreted your statement. A. That is right.

Q. 120. That is, the amount that you left in was about the maximum amount that reasonably should have been left in? A. Yes.

Q. 121. Anything in excess of that was an unreasonable accumulation beyond the reasonable needs of the business? A. It seemed so to me.

Q. 122. Yes. Now, is that the way I am to interpret the 1932 and 1933 figures which you gave, or is there a variable in there that ought to be given an account for? A. I think you can interpret 1932 in the same manner.

1933 is a difficult problem, because, as Your Honor heard, on the books there is a deficit, and yet there is all this question as to whether that $2,200,000 they wrote off the Transit Company was a real loss, or it is all mixed up in that—in that bank closing, and it is very difficult to tell what there was there at all, so I made it conservative, $800,000.

The Member: Anything further?

Mr. Welch: Just one or two questions.

Recross-Examination.

X-Q. 123. (By Mr. Welch). If I follow your last testimony, it is to the effect that as to the year 1933, it is pretty difficult to say one way or the other whether there was an unreasonable accumulation? A. Yes, sir; very.

X-Q. 124. Thank you very much for that, Doctor.

And then one thing more: I like the honesty with which you have faced this 1940 crisis and the debts and this preferred stock and so forth. There is only one thing we didn't mention, Doctor, and that is when the crisis is over clearly the enterprise ought to have a sound working capital, shouldn't it? A. Yes, sir.

X Q. 125. And a liquid one? A. Yes.

X Q. 126. Could you make some suggestion to His Honor as to what that should amount to? A. Well, that I thought somewhere around $5,000,000.

X Q. 127. Not less than that? A. Not less than that.

X Q. 128. Thank you. A. And that I intend to be provided for in these figures.

X Q. 129. Yes. You are going to borrow your liquid working capital. A. No. I think out of this amount which is to be accumulated, because what we have here, with such pretentions as I have suggested here, we would have well above something above it, but if it were in any event miscalculated, the liquid capital could be borrowed on this stock of the New Jersey Company which the Maine Company holds.

X Q. 130. Just one thing, Doctor: You feel very sure about that borrowing in 1940, which is still obscure to us. If I had sat in the directors' room and said to you, "You sound awfully good to me, Dr. Friday, but I am not free from worry whether we could do it or not, and I will feel more comfortable if we accumulate it and have it in cash," you wouldn't have thought that just entirely unreasonable of me to say that, would you? A. No, but I

X Q. 131. You have answered it. A. I would—

X Q. 132. And now, Doctor— A. No, that isn't answering it at all.

X Q. 133. Well, you said "no." The question was— A. Well, I would have felt sorry for you that you didn't know

any more about what happens to interest rates after depressions.

Mr. Welch: I move to strike the answer out after the word "no." I think it is a poor note on which to end the case. I think I will move to strike beyond the "no."

The Member: I will deny the motion.

Mr. Welch: That is all.

Mr. Clark: I have nothing further.

The Member: Thank you, Doctor.

(Witness excused.)

Mr. Pierson: If Your Honor please, I offer in evidence the recomputation of taxes to which reference was made earlier in the proceedings.

The Member: That is the one which Dr. Atkins made?

Mr. Pierson: No, Your Honor. This is a recomputation of taxes that was offered earlier and objected to. It is based on the computation of taxes under the theory that all of the earnings or profits would have been distributed, following the computation used by the Supreme Court in the case of Helvering and National Grocery Company.

The Member: Now, wait a minute. That is a wide jump. That is going back to the early part of last week.

Mr. Pierson: I think I can clarify it by—

The Member: Well, now, last week it was offered and then an objection was made, and the objection was sustained, and there was some suggestion made about—

Mr. Pierson: Corrections.

The Member: —changing the computation.

Mr. Pierson: That is correct.

The Member: Now you are offering that and there is no objection?

Mr. Pierson: No objection; quite correct, Your Honor.

The Member: It is received.

Was it already marked before for identification? Was any number saved for it?

Mr. Pierson: No, I don't think there was, Your Honor. I was about to reoffer it.

The Member: It is now YYYY.

Mr. Pierson: And that consists, Your Honor, of ten sheets.

(The documents so offered and received in evidence were marked "Respondent's Exhibit YYYY," and made a part of this record.)

Mr. Pierson: Now I offer in evidence a schedule of the sales of the New Jersey Company bonds on the Boston Stock Exchange for the years 1929 to 1933, inclusive. That is eliminating the years for which there were no schedules.

Mr. Welch: Oh, yes.

The Member: That is the one that was put on with Dr. Atkins?

Mr. Pierson: That is correct, Your Honor.

The Member: No objection?

Mr. Welch: None.

The Member: That is received. The number which was saved was VVVV, was it?

Mr. Pierson: And that consists of seven sheets, Your Honor.

The Member: Very well.

(The documents so offered and received in evidence were marked "Respondent's Exhibit VVVV," and made a part of this record.)

Mr. Pierson: If Your Honor please, I now offer in evidence a photostatic copy of pages 522 and 523—

The Member: What number was saved for that so that you don't have to describe it again?

Mr. Pierson: — In accordance with Your Honor's sug-

gestion this morning. I don't believe any number was saved. It was—

The Member: Oh, no. I just want to know which one it is you are offering now.

Mr. Pierson: This is from Volume 35.

The Clerk: That was UUUU.

The Member: UUUU.

Mr. Pierson: Pages 522 and 523.

The Member: All right. That is received.

(The pages referred to were thereupon marked "Respondent's Exhibit UUUU," and were so received in evidence and made a part of this record.)

Mr. Pierson: If Your Honor please, in having these photostated, I find that they didn't complete the schedule continuing on to page 524. If I may be permitted to read that into the record, it will supplement the exhibit which has just been offered.

The Member: Very well. You are now supplementing Exhibit UUUU?

Mr. Pierson: Yes.

The Member: Very well.

Mr. Pierson: On page 524, "George H. Burr & Company, Chgo. 12-30-31," under the column "Wants," at 85. Under the column "Offerings," at 90. "Fuller Crittenden, Chgo. 12-30-31," under the column "Wants," 10 at 90; under the column "Offerings," 10 at 93.

I also offer at this time—

The Member: Wait just a minute. Is that all of the supplement to UUUU?

Mr. Pierson: That is correct, Your Honor.

The Member: All right.

Mr. Pierson: Unless that is marked—I have forgotten just how it was marked this morning.

I also want to offer in page 539 and page 540 of this same volume.

The Member: You mean that is part of the same exhibit?

The Clerk: That is part of the same exhibit.

The Member: Well, let that be put in as part of the same exhibit. That makes the pages how many?

The Clerk: Three pages in all.

The Member: All right. That is what you said in the first place, isn't it?

The Clerk: Yes.

The Member: Now, is there anything more from those books?

Mr. Pierson: Yes, Your Honor. And if I can get the exhibit number from the Clerk on the next—

The Clerk: TTTT. That is from the No. 36 Volume?

Mr. Pierson: That is correct.

The Clerk: Yes.

The Member: How many pages of that?

Mr. Pierson: Three pages, Your Honor.

The Member: That is received as Exhibit TTTT.

Is that complete? Is Exhibit TTTT complete?

Mr. Pierson: That is complete, Your Honor.

The Member: Very well.

(The sheets so offered and received in evidence were marked "Respondent's Exhibit TTTT," and made a part of this record.)

The Member: Now, what else?

Mr. Pierson: That is all.

Mr. Clark: Respondent rests.

Mr. Green: We have one short witness, Your Honor, who won't take more than—we will finish by 4:30, I think, in rebuttal.

The Member: I am going to quit at 4:30 finished or not. Now you can take your choice. If you want to quit now, I

will quit now. If you want to go on now with that assurance, you may do so.

Mr. Welch: It simply depends on what happens tomorrow. I take it Your Honor wants oral argument?

The Member: I want oral argument.

Mr. Welch: Then I see no reason why we shouldn't put this bit in in the morning.

Mr. Green: Might as well.

Mr. Clark: Your Honor, I want to say this: So far as Respondent is concerned, the case is going to be briefed. The Respondent is not prepared for oral argument at this time.

The Member: Well, I prepared you, Mr. Clark, last week.

Mr. Clark: I realize that.

The Member: Now, wait just a minute. The rules have stated succinctly and clearly that the parties in every case shall be prepared to make oral argument at the close of the submission of the case, and in view of the uncertainty in which I have labored throughout this proceeding, I want this case submitted with a clear statement on the part of the Government as to what its theory is and as to how the evidence measures up to the theory which the Respondent has selected for his case, and it is for that reason that I want oral argument.

Mr. Clark: Well, the Respondent has selected, Your Honor, or has elected to rest on the determination of the Commissioner in the 90-day letter to the effect that section 104 applies in this case. The Respondent is standing on all of the provisions of section 104 except that Respondent admits the corporation was not formed for the purpose—for the forbidden purpose, as we call it.

Other than that, Respondent rests on the statute.

The Member: Do I understand that you are going to refuse to make an oral argument?

Mr. Clark: I have no argument to make, Your Honor, in that regard. Respondent rests on the statute. I have no desire to be interpreted as refusing to make an argument, but that is the only argument I can make.

The Member: We will have an oral argument at the close of the trial. That will take place tomorrow morning.

Mr. Welch: Could I ask just one question? Could the argument for the Petitioner be divided between Mr. Green and myself?

The Member: Yes, and there will be an hour on a side allowed. You can divide it on either side the way you want to.

Mr. Welch: And who argues first? I had hoped—

The Member: The Petitioner is the proponent.

Mr. Welch: I had hoped that in your discretion, because of the fog in which we are, that the Government might be ordered to argue first, because I have yet to see the fulfillment of Mr. Pierson's promise that the issues would be made clear to us.

The Member: I am not making any order. I am telling you gentlemen on both sides in the case that there will be oral argument desired at the close of the trial, and that I am allowing one hour on either side, and you may divide that as you will, and the responsiblity for saying on the part of either one of you that there will be no oral argument will be yours.

I haven't any power to order Counsel to do anything, particularly when Government Counsel are not listed and enrolled as members of the bar before the Board. This is the first time that this suggestion has ever been made, and I hope that it won't be fulfilled in this case.

We will suspend until 10 o'clock tomorrow morning. (Whereupon, at 4:25 o'clock p. m., February 8, 1939, the hearing in the above-entitled matter was adjourned.)

[Title omitted.]

NINTH DAY.

REPORTER'S MINUTES.

(Filed Feb. 13, 1939)

Hearing at Washington, D. C., on the 9th day of February, 1939, at 10 o'clock a. m.

The hearing in the above-entitled proceeding was resumed on this the 9th day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted).

PROCEEDINGS.

The Member: You may proceed, gentlemen.

Mr. Pierson: If Your Honor please, I have just spoken to counsel on the other side. My associate, Mr. Clark, is ill this morning and could not come before the Board, and I told him that I was going to propose and ask Your Honor for an adjournment of the case until 2 o'clock this afternoon in order that we may make the oral argument to which we referred yesterday; and on that ground I ask leave or move for an adjournment until 2 o'clock this afternoon.

The Member: Now, what about the further evidence in the case? There was to be further evidence before the oral argument began. Is there any reason why that should not proceed? There was to be rebuttal testimony, as I understand it.

Mr. Pierson: Well, if Your Honor please, I would prefer that Mr. Clark be here in that regard.

The Member: How much time do you think your rebuttal testimony is going to require, Mr. Welch?

Mr. Welch: That, if Your Honor please, will be short indeed, ten or fifteen minutes. It is all so simple that if Mr. Pierson were advised of what it is he would well say, "Let us put it in."

The Member: Could you tell him without making—

Mr. Welch: Could I say one other word?

The Member: Yes.

Mr. Welch: Naturally I do not think any attorney would propose a postponement at this date on account of illness. I did, however, want to say this, Your Honor; Mr. Green and I have worked on this case since last August without our usual vacation, and we are almost at the end of our resources. We have contemplated arrangements about going South tonight, happily to loaf for some time. We want to go, and I should like to say now that if we adjourn until 2, in so far as I have any rights, and I think they are not very great, and they are not unreasonable, if we do go on at 2 and finish the case today—I hate to say that; I have no right to suggest it—before 4:30, but at least we want to finish it today.

The Member: If we start at 2, and I am speaking now only of the oral summation of the case, when I said yesterday, suggested an hour on a side, I meant that as a maximum and not as a suggestion that I expected an hour would be consumed if it is unnecessary to take that length of time. I just wanted you to condense whatever you have to say within an hour rather than to expand it to take up an hour. So that if the theory of the time for the oral argument is correct, we ought to be through by 4 o'clock, because I shall adhere rigidly to the time. Starting at 2, we should be finished at 4, or earlier.

The question is whether we can dispose of this very short

evidence now rather than to wait until 2 o'clock and prolong the afternoon session, and I think if you will tell Mr. Pierson what it is you are going to put in, he may be willing to let it go in without Mr. Clark.

(Mr. Green, Mr. Pierson, and Mr. King confer.)

Mr. Pierson: I think, if Your Honor please, having examined the documents which Counsel for the Petitioner exhibited, we can proceed at this time.

The Member: Very well.

Mr. Green: I offer in evidence a notice of deficiency dated January 17, 1939, with statement attached addressed to the Chicago Stock Yards Company, the Petitioner in this action, for the years 1934 and 1935.

Mr. Pierson: If Your Honor please, I realize that the door has been opened with respect to the subsequent years in this case, but I fail to see the materiality of a deficiency letter which covers those years.

The Member: I do, too. What is it?

Mr. Green: If Your Honor please, as Mr. Pierson has stated so many times, he put in this later evidence to show the subsequent history of this company. This shows the subsequent history. Beyond that, it shows that one of those future contingencies which might be within the contemplation of directors of a corporation has come to pass.

The Maine Company for the subsequent years has been taxed as a personal holding company, which, of course, required it to distribute the larger part of its income, and it will be able to accumulate nothing to aid it in taking care of its 1940 program. It also serves—

The Member: Now, wait just a minute. Let me absorb that for a second. You mean that this tends to show that between the years in question here and the so-called crisis of 1940 that there have in fact been some unforeseen events which make demand upon the surplus of the corporation

and tend to show the reasonableness of the fact of accumulation in the taxable years; is that the theory?

Mr. Green: That is in part it, and in part to show that when these experts for the Government testified, the Maine Company would be under no difficulties in meeting its 1940 obligations if they were not taking into consideration future contingencies.

The Member: Yes.

Mr. Pierson: I might add, Your Honor, that I do not believe that that is a final determination, is it, by the Bureau of Internal Revenue?

Mr. Green: It is a notice of deficiency.

Mr. Pierson: But with respect to whether the corporation has paid the taxes stated herein

Mr. Green: It is a notice of deficiency.

The Member: That is all you are offering it for?

Mr. Green: That is all I am offering it for.

The Member: I will overrule the objection.

Mr. Pierson: Exception.

Mr. Green: May I have leave to substitute a photostat for the original?

The Member: If it is a legible photostat.

Mr. Green: It is. I will display it to Your Honor.

The Member: What number is that?

Mr. Green: That is a notice of deficiency consisting of one page, and a statement attached consisting of seven pages.

The Clerk: Petitioner's Exhibit No. 46.

(The document so offered and received in evidence was marked "Petitioner's Exhibit 46," and made a part of this record.)

Mr. Green: Mr. Donovan, will you take the stand, please?

The Member: You have already been sworn?

The Witness: Yes, Your Honor.

MR. JAMES F. DONOVAN

having heretofore been duly sworn, was recalled as a witness for the Petitioner, and was examined and testified as follows:

Direct Examination.

Q. 182. (By Mr. Green). Mr. Donovan, I show you Respondent's Exhibit E. That consists of a schedule of securities sold by F. H. Prince & Company to the Stock Yards Company during the year 1930 when there were none, and during the years 1931, '32, and 1933 when there were some such sales.

(Witness nods head affirmatively.)

Q. 183. Can you tell me, Mr. Donovan, how the prices at which those sales were made from F. H. Prince & Company to the Maine Company were fixed or determined? *A.* I can.

Q. 184. Will you please do so? *A.* Those securities were sold at the then current market values.

Q. 185. Were those securities all securities which were listed upon some stock exchange or traded in upon the over-the-counter market? *A.* They were.

Q. 186. Mr. Donovan, have you prepared a schedule showing the disposition of these securities contained in Respondent's Exhibit E by the Maine Company? *A.* I have.

Q. 187. Have you that schedule with you? *A.* I have.

Q. 188. With reference to the date on that schedule, Mr. Donovan, with the exception of certain market values as of December 31, 1938, has that schedule been prepared from the books of the company? *A.* Yes, it has.

Q. 189. And are those books here in this courtroom? *A.* They are.

Q. 190. Now, I notice that as of December 31, 1938, some of those securities which appear on Respondent's Exhibit E

were still retained by the Maine Company undisposed of. A. That is true.

Q. 191. And that you have included in the schedule, a value for these securities on December 31, 1938; is that correct? A. That is correct.

Q. 192. Will you please tell us how that value was determined? A. These quotations were valued—were secured from the Financial and Commercial Chronicle and other sources.

Q. 193. And what other source? A. From the so-called unlisted security market quotations, through that market.

Mr. Green: I offer this schedule, Mr. Pierson.

Mr. Pierson: May I ask the purpose?

Mr. Green: The purpose is to show in Mr. Clark's opening he indicated that there would be a contention on the part of the Government that the Maine Company did not need its property, its liquid property, because a portion of it was diverted to purchasing securities from F. H. Prince & Company.

The purpose is to show that these securities have all either been disposed of by the company or are all marketable securities which can be disposed of at a net price in excess of what the Maine Company paid F. H. Prince & Company, and that, in fact, the Maine Company was not used as a dumping ground for worthless securities.

Mr. Pierson: If Your Honor please, I do not see the materiality of the document. The fact remains, it seems to me, that the Maine Company actually made these purchases of stock from F. H. Prince & Company, and after it comes into the hands of the Maine Company I do not see where it is material as to what the Maine Company does with it. They become assets in the hands of the Maine Company, but what the Maine Company does with them

after they are acquired it seems to me to be entirely immaterial.

I object.

The Member: I will overrule the objection.

Mr. Pierson: Exception.

The Clerk: Petitioner's Exhibit No. 47.

(The document so offered and received in evidence was marked "Petitioner's Exhibit 47," and made a part of this record.)

Q. 194. (By Mr. Green). Mr. Donovan, have you at my request prepared a schedule showing the purchases by the Maine Company of common stock of the New Jersey Company during the years 1934 to 1937, inclusive? A. I have.

Q. 195. And was that schedule prepared by you from the books of the Maine Company? A. It was.

Q. 196. And have you the books present in the courtroom from which it was prepared? A. I have.

Mr. Green: I offer that schedule.

Mr. Pierson: No objection.

The Clerk: Petitioner's Exhibit No. 48.

(The document so offered and received in evidence was marked "Petitioner's Exhibit 48," and made a part of this record.)

Q. 197. (By Mr. Green). Mr. Donovan, has the Maine Company purchased any common stock of the New Jersey Company since December 31, 1937? A. They have.

Q. 198. Have you personally participated in making such purchases? A. I have.

Q. 199. Will you please tell us the number of shares of the common stock of the New Jersey Company which the Maine Company owns today? A. 64,369.

Q. 200. Leaving outstanding in the hands of others how many? A. 631 shares.

Mr. Green: Your witness.

Mr. Pierson: No questions.

(Witness excused.)

Mr. Green: That is all of the Petitioner's rebuttal.

The Member: We will suspend now until 2 o'clock preparatory to summation in the case.

Mr. Welch: I understand, however, that the evidence is closed on both sides.

The Member: The evidence is closed on both sides.

Mr. Pierson: There is just one matter, if Your Honor please, in regard to Respondent's Exhibit D. When that was offered in evidence there was put in pencil sheets, and I have had those typewritten, and if Your Honor will prefer, I will submit one of those typewritten sheets. It is more legible, so that it is easier to read. They are the so called revised balance sheets.

The Member: Have you seen this, Mr. Welch?

Mr. Welch: No. I am sure it is correct, and there is no objection to the substitution.

The Member: Very well. Let this be marked Exhibit D in substitution for the other.

Mr. Pierson: That consists, Your Honor, of seven sheets.

The Member: Now, have you both thought carefully, so that no loose ends are left dangling now, so that the case is closed? If there is any doubt about it, I will sit here and let you both ponder, so that when you open again at 2 o'clock I do not want any further talk except to hear whatever there is said by counsel by way of summation of a closed case.

Mr. Welch: The Petitioner rests. The evidence is clearly closed.

Mr. Pierson: The Respondent likewise, Your Honor.

The Member: Very well. We will suspend until 2 o'clock this afternoon, and will — perhaps I should not request this,

that both sides decide before 2 o'clock how you are going to divide your time, and more particularly we would like for the Petitioner's Counsel that they make up their minds how much of their time they are going to use in opening, so that I may have some idea as to when the Petitioner's opening will be closed, the Respondent's argument will then take place, and the Petitioner will use whatever time is in reserve for the closing.

Mr. Welch: I will say now that I will argue for the Petitioner and that my present notion is that I shall argue but once and not in answer to the Government's argument.

The Member: Very well.

(Whereupon, at 10:23 o'clock a. m., a recess was taken until 2 o'clock p. m. of the same day.)

Afternoon Session.

The Division resumed hearings at 2 o'clock p. m., whereupon the following proceedings were had:

The Member: Do you feel all right, Mr. Clark?

Mr. Clark: I feel very much better, and I want to say I appreciate your courtesy in continuing this matter.

The Member: It is all right. I am sorry you are not well.

Argument on Behalf of the Petitioner.

Mr. Welch: I think it is fair to say this case has seemed as long to me as I think it has to Your Honor, and I am glad now that now we may bring it to a close.

As I start my argument, I know no better way to begin than the place at which the case itself began; that is, the notice of deficiency. Before I read that, as I mean to read it, I should like to read what I consider to be a proper re-

tice of deficiency in a case with which Your Honor is familiar. That is the Rands, Inc., case, Docket No. 74942, before this Board in which Your Honor wrote the opinion. In the statement of reasons, the notice of deficiency in that case read as follows:

"That you have incurred liability under the provisions of section 220 of the Revenue Act of 1926 and section 104 of the Revenue Act of 1928. The fact that your company is a mere holding or investment company and has permitted your gains and profits to accumulate beyond the reasonable needs of the business instead of being distributed is construed as prima facie evidence of a purpose to prevent the imposition of the surtax upon your stockholders. Accordingly, you are subject to a tax equal to 50 percent of your net income as defined in section 220(d) of the Revenue Act of 1926, and section 104 (c) of the Revenue Act of 1928."

I read that to Your Honor because I conceive that to be a proper notice of deficiency. Clearly, the taxpayer in that case was advised of three things: That he was charged with the intent; he was charged with being a mere holding company—or it was charged with being a mere holding company; and that it was charged with having permitted its gains and profits to accumulate beyond the reasonable needs of the business. And had I been counsel for Rands, Inc., I should have known just how to try my case.

Now, I would like to contrast with that the statement accompanying the notice of deficiency in the case that is now before Your Honor. It is attached to the petition as Exhibit A and it reads as follows:

"After careful consideration of your federal income tax returns, the protest as mentioned above and all other available information, the Bureau holds that your corporation is subject to taxation under section 104 of the Revenue Acts of 1928 and 1932."

And that is all it says. Now, it is obvious, if Your Honor please, that these two statements, the one in the Rands' case and the one in the case at bar do not equal each other. It is difficult for me to believe that they are drawn thoughtlessly. The difference, it seems to me, is almost fantastic. It must be that there is some significance in the difference between what I conceive to be a proper notice of deficiency and the notice that we have here, and I am not surprised that Your Honor took quickly the view that the question of a mere holding company or the question of unreasonable accumulations was not at issue here, and I think Your Honor has been perhaps a bit restive as we conducted what seemed to you and what I confess seemed to me a pillow fight for most of the case.

But Counsel in preparation of the case and trial of the case was faced with something else, that had been said by a Member of the Board in an opinion in another case, which is the Mellbank case, Mellbank Corporation v. Commissioner, which is Docket No. 80008, before this Board, and I should like, if I might, to read a short paragraph from that opinion.

In the deficiency letter Respondent held only that the Petitioner was "subject to taxation under the provisions of section 104 of the Revenue Act of 1932"; that is to say, in the Mellbank case the statement was substantially or precisely identical with the one here.

The Court for the Board further went on to say:

"It was not indicated whether such holding was based upon the premise that the petitioner corporation was formed for the indicated purpose or that it was availed of in the taxable year for such purpose, or both, nor did the deficiency letter hold that petitioner was 'a mere holding or investment company,' or that its gains and profits had been

permitted to accumulate beyond the reasonable needs of the business.

"On brief Respondent urges in support of the determination. We shall therefore consider seriatim the various arguments stated."

And then the Board considered everything.

Now, of course, it does not say "we must therefore consider"; it says merely "we shall consider."

But with that case facing Counsel, and that statement in it, as I indicated to Your Honor before, nobody at this end of the table had the courage to try the case on the issue that we thought actually was involved. We did not dare stop short of trying both the question of accumulations and the question of the mere holding company. Now, if through terror we tried something that we should not have tried, it seems to me nothing could have followed from our injection, if you wish to put it that way, of that issue in the case, other than, perhaps, this way, that if through terror we injected the issue it then placed us just in this position, that it is not as if those things had been found by the Commissioner, but simply that the issue is injected, and at the highest, or, I should say, at the lowest, the Government has the burden of proof on the questions of mere holding company and unreasonable accumulations.

But I cannot make it too clear to Your Honor,—it is my own belief that those issues are not in the case, and that it was beyond our power of ever making the issue, and yet with the Mellbank case before us we had no choice as we tried the case, and I think Your Honor will understand that I have no choice as I argue it; I must argue on the questions of holding company and unreasonable accumulations.

The Member: Your petition makes the issues.

Mr. Welch: I have said that we have stated those issues,

and, as I say, at the highest we may have created a lot of terror in issue. If so, I think it is an issue on which the burden is fully as much on the Government, and I think more, than it is on us.

Now, on the point of a mere holding company. I have argued before Your Honor all along in the case as I cross-examined witnesses, and it seems to me that there is very little that I can add. That must have been made apparent to Your Honor. I think the issue as to whether or not we are a mere holding company was settled as early as 1922, and in the three years prior to that, when the New York Central lease was negotiated. Certainly the Maine Company was doing something about the Railway Company which has become of the utmost significance in this case. It was settled again at the death of Mr. Sporr in 1926, when, as some of the western witnesses put it, the East came west, and I think Mr. Leonard added, "It was only a little while that I was the hired man. My orders came from the East, and the most we did from the west was initiate suggestions and send them along, and we either got the veto or we got the green light to go ahead." From 1926 on the issue of a mere holding company was settled every day and every month by telephone call, by letter, by constant supervision, the choice of bank accounts, the selection of key men, told not to build hog houses, told to put money in the banks, and hundreds of things we thought of, and, as I put to the witness yesterday, the definition of "mere" as I found it is "nothing else but." It takes so little, so little to make a holding company something other than a "mere." And I think the case was settled by Dr. Friday on the stand yesterday. Even Dr. Friday, the expert for the Government, could not see any longer that it was a mere company.

Now, what evidence is there against that? An expert

takes the stand, and if Your Honor will pardon me for commenting on it, he is allowed to testify as a matter of opinion that we are a holding company. He does it by looking at some ancient tax returns and percentages of time spent by Mr. Prince in running this company or that. Well, it seems to me that is a fanciful and slender way of going about facts, that the East ran the West, and that the hand of the Maine Company rested, not lightly, but heavily on those companies all through this period. It seems to me too clear to require further argument from me.

I then pass on to the question of unreasonable accumulations, always pausing to remind Your Honor that I do not have the issues in the case, but feeling that I must argue them.

The Member: Well, Mr. Welch, I want to be sure that I understand you. There was a definite allegation that that is the fact in the petition.

Mr. Welch: That is correct.

The Member: And that allegation is denied in the answer.

Mr. Welch: That is correct.

The Member: And you think, notwithstanding that fact, the absence of the determination of that factor in the deficiency notice still leaves the issue which the Petitioner itself raised in the petition is not in the case; is that the way I now understand you?

Mr. Welch: I doubt if we could inject the issue in that way. If it was, it was injected in the ordinary way, the position of the Respondent and the position of the Petitioner precisely equalled before Your Honor as we talked about the fair preponderance of evidence on those two points, and if there was an issue raised that should not have been raised, and Your Honor strongly took that

view, I suppose it would be within our power even now to withdraw the issue by an amendment to the petition, but that has been—

The Member: I think you will find some law on that subject, which I shall be glad to have you consider in your brief. In the Andrew W. Mellon case, in which the Petitioner did allege in his petition and raised an issue which he was not required by the notice of deficiency to raise, and the Board, I think, held that since the Petitioner had made the allegation and thus had taken upon himself the burden of establishing its truth, he could not be heard to say that the issue was not in the case of his own raising, and must be held to the standards of proof, which his own issue put upon him. But I merely suggest that for further study before you reach the case.

Mr. Welch: I am quite willing to face that because I think Your Honor certainly would be far from criticizing Counsel who were in the position that I pointed out to you at the beginning of my argument for raising an issue which the Board had certainly to a notable extent indicated was in the case whether the original notice of deficiency was correctly drawn, as I put it, or incorrectly drawn.

Now, on the accumulations I don't think that there is much I need do except to turn to the chart, which in the end became the guide for both sides. The validity of the chart and its significance has, I think, been apparent to every one, and I am, of course, speaking of Plaintiff's Exhibit 45. It is perfectly clear from all the Government experts that the red column represents the low, as you might say, of what must be done in 1940, although some of them very clearly, and others a little more grudgingly, and by "all of them" I mean the Government's experts, say the Jersey Company should be liquidated. Clearly, I should suppose, there is no one in the court room that doesn't

feel that that company should be liquidated. Nobody has challenged the validity of the red columns in the sense that they represent what is needed to liquidate it. It is true, of course, that the blue columns are the liquid or fairly liquid assets available to do the job, but it is equally clear that if they were all used every cash box would have been scraped clean, every security gone, and the whole enterprise stripped of its working capital. And so I say to Your Honor that until the blue columns rise at least to meet the top of the red columns, the question of unreasonable accumulations has not yet come over the horizon. There is no room yet to talk. But I don't even have to say that. I can go with Dr. Friday and I can compare the red columns against only the hard solid fact of debt, just plain debt, and never in any of the years in question—never, in fact, in any year at all has the blue line risen to meet that part of the red column marked "B" which is just plain debt.

Now, surely, surely, until this company has accumulated enough to pay its debts, no one can stand in this room and say with conviction that the accumulation is entirely unreasonable. If that blue column had risen above the "B" I should in no sense have been embarrassed because it always must be remembered that that is everything there is, and that any company needs, and, particularly, any company this size needs: A very substantial working capital. We have learned in this case, whether my brothers like it or not, that ten million dollar emergencies can arrive unheralded and, by the ten million dollar emergency I, of course, mean what happened in the Chicago banks. And so, Exhibit 45, this chart, remains as the measure of what had to be done, and as a visual proof that it never has been done.

And as the Government experts take the stand it is curious to me, Your Honor, they applaud everything up to

1929. They will say the accumulations were good up to then; all right to do that. But they say, "You have done so nice a job by 1929, you can slow up now and push out more to your stockholder." To which the answer, I think, is never until the job is done; never until the blue column rises to equal all the red columns must that thought be considered. It has been a long hard road up these blue columns, and in 1929 it might well be that they turn down again, as, in fact, they did. So that this company might well have had a cushion clear about the top of these red columns in the years here in question, a cushion against the 10 million dollar disaster that overtook them, and no one, I think, could have complained of that. And yet they never succeeded in building that blue column even up to the line of that hard rocky portion marked "B" which means debt.

Now, if Your Honor please, I would like to chat for a moment along quite a different line. I would like to imagine if we can that Mr. Prince has gone to see his old friend Mr. Walker, who testified in the case, and Mr. Prince is now talking to Mr. Walker, and we are in the year 1933.

Mr. Prince says, "Mr. Walker, I have had the opportunity to talk to three business experts about my business, and I got the opportunity free. I talked to a Mr. Merriman, to a Dr. Atkins, and a Dr. Friday, and I would like to tell you, Mr. Walker, what those three men said to me. First, Mr. Merriman, I told him I had this worry and this trouble, this debt I owed, and I asked him what he thought about it, and Mr. Merriman said to me that he liked the prescription I have been taking all the way up to 1929, building up assets to meet the debt. But he said I didn't need to take the prescription in such quantities any longer, and that he had a new medicine for me. He said that if I quit taking my prescription he would give me a pill made

out of a blue line which was ten times earnings. In some way I could take a picture of ten times earnings somewheres and borrow money for my 1940 requirements. And I listened to Mr. Merriman, and I went away.

"And then I got a chance to talk to a man named Dr. Atkins. And he discouraged me because he said my disease was permanent; I would always have to remain in debt. And Dr. Atkins I couldn't understand at all because he said he was just as happy about hope as he was about cash. And he said that if he owed a mortgage on his house, he wouldn't care whether it was paid off or not. And I didn't get any comfort out of Dr. Atkins.

"And then, Mr. Walker, I went to see a Dr. Friday, and, Mr. Walker, I liked him. I thought he was honest, and I thought he was intelligent, and he talked to me about my business. He, too, said he thought I had been taking the right medicine up until 1929, these accumulations, but he, too, wanted to reduce the dose; and, Mr. Walker, he wanted me to cut it down right in the years when I was feeling worse, right through the depression, and it seemed more important to me than ever that I should build up my cash reserve.

"Now, he had something he was going to do for me in 1940 if I cut down this dose that I had been taking. He was going to have me borrow on a collateral trust mortgage. That bothered me because I heard collateral trust mortgages aren't very happy things nowadays; that they have gone out of style. And another thing that puzzled me about him was that he thought I had better run for luck on borrowing enough to pay off the preferred 6½ millions, and I have got to go out, Mr. Walker, and borrow my working capital, another 5 million, if I take his prescription. And I don't know, Mr. Walker, what it is going to be like in 1940, and these experts that I talked about don't agree

about how large this dose of accumulations that I like each year to make me feel good should be. They differ about it. And they are awfully good men, and they are experts and they puzzle me and they leave me worried. What do you think about it, Mr. Walker?"

And now, Mr. Walker, his old friend, and a very experienced man, speaks, and this is Mr. Walker speaking:

"Well, Mr. Prince, at the best you are going to have to have an operation of some kind in 1940." And I can see Mr. Prince recoil. "I am afraid of operations." "I know, but I think it will be all right. You may need a little oxygen, but I think this financial operation in 1940 will be all right, and you leave it to me. When 1940 comes, I think some way, if you haven't got enough to pay your debts and liquidate the Jersey Company—I think in some way we will manage to find it for you, but it is going to be an operation."

And now I would like to imagine Mr. Prince going away after having talked to all of them, sitting down and thinking and saying, "Well, the doctors disagree and they worry me, too, but I know one fine old household remedy. I know that if I save up my funds to pay my debts, that that is just so simple and so beautiful that it will let me sleep nights every night between now and 1940, if I can make the grade, and every night thereafter."

And so I would suppose that had Mr. Prince had the pleasure of talking to all of these wise men in 1933, as I have now imagined, and had them praising him for his conduct in accumulating up to 1929, and then been puzzled by their saying "Let's cut it down now," I think after talking to all of those men and hearing their divided counsel, that Mr. Prince would have said to himself, "No, I plotted my course a good many years ago. It is simple; it is understandable; and it is safe. I am taking out $400,000

a year. That is all any man can wish for. I think it is a generous dividend. It is 5 percent on the capital stock. And I will save the rest, and if, happily, the time comes before 1940 when I can make the blue line equal or exceed the red, I will give three cheers and push it all out, but I will not do it until then."

Now, I turn to argue the one thing that we all know is surely in this case, and which I must face squarely, and which I face with pleasure, and that is the question of intent. There is, of course, the finding of the Commissioner which involves in it, as I view it, a determination of the intention to avoid the imposition of surtaxes which existed. When we reach the court room and we show our hand as was said in the United Corporation case in the second circuit, as I understand the law to be, the presumption disappears; but I am not sure of whether this Board has always taken that view. It may be that it is the view of the Board that the presumption continues and must be overcome by petitioners' fair preponderance of proof. I don't at all care which it is because the task in this case doesn't seem to be difficult. I think the record of Mr. Prince's intention has been made clear all through the years. I think it began as early as 1911, when he urged Jersey stockholders to take bonds of the Maine Company instead of having their stock stamped, and gave them a little inducement of an extra one percent. I think it was clear then as early as that, that the intention was to liquidate the Jersey Company when its charter expired, and, certainly, before Christmas was celebrated in that year. When 1914 came around, his intention was made clear, because F. H. Prince & Company had gone out into the market and started to buy Jersey common stock. By 1918, as I remember it from the evidence, F. H. Prince & Company had put up something like 4 millions of dollars of Mr. Prince's money to buy Jersey common. You

can see why it was necessary as you look at the blue column. I think it was Mr. Merriman who said the enterprise was a thin margin enterprise until the New York Central lease came in. It was so thin a margin enterprise that Mr. Prince, as I say, put up 4 millions of dollars to go and buy Jersey common, so that he could be sure in 1940, although it was years and years ahead of him, that he would control the destiny of that company, and that he could take care of its liquidation.

Then his intention was made clear again, so far as the evidence in this case is concerned, when he talked to Mr. McDonough in 1925, and told Mr. McDonough what his plans were. He said he wanted the Maine Company to accumulate cash so that it could pay off the indebtedness of the Jersey Company when 1940 came, so that he could own this enterprise free of debt. And I think on another occasion he said to Mr. McDonough, "Fifty years is long enough for a concern to be in debt; I want it out of debt when the time comes." His intention in this case was made clear once more, at least, and that is when he talked to Mr. Reimers about the Chicago bank situation.

I thought it was entertaining and interesting to hear Mr. Reimers' story of it. He hadn't met Mr. Prince before; he knew nothing of this enterprise and what it was. Mr. Reimers was being invited to come in in what almost amounted to membership in the family. So Mr. Prince sat down with him and told him what his companies were and what they had been doing and what his plans were for them, and he told Mr. Reimers then that he was going to need lots of money in 1940 to do a gigantic task that then faced him. And not only that, Your Honor, he recorded that conversation as one of the milestones in this case, and he recorded it in the subordination agreements that are in evidence here after the money was put up in the Chicago

banks. He did this remarkable thing so consistent with his whole life. He insisted that the Maine Company's money should be on the upper level of the subordinated funds so that its money should come out first. Not much came of it, I admit, because we quite know that if the money of the operating companies had come out on equal basis, he could have ordered it up by dividends, but he liked the idea that there should be no delay in the Maine Company's money reaching it. We are not so far away from 1940. He wants to be sure it gets there.

If Your Honor please, he recorded his intention in another way, in a chart which has had little attention so far in this court room, and which I meant to save for argument. I am now speaking from chart No. 40 that had an unlovely affectionate name. As we worked on the case, we called it "The sucking chart," because it shows how the Maine Company sucked out all the income and many times more than the income of all the underlying companies. It is my hope that Your Honor will some day sit for a moment or two and study that chart, because I think it has an immense probative force in this case. If you studied this chart for 1923, oh, let us say, when the full effects of that gorgeous Railway lease come in, you will find that on this sucking chart the Maine Company sucks up all the income of the operating companies. Now, why is that important, if Your Honor please? It is important for this reason:

Mr. Prince is accused here of having the nefarious purpose of avoiding surtaxes, and that he accumulated funds in the Maine Company instead of pushing them out in the form of dividends to himself. Now, that implies, if Your Honor please, that he is a crafty person, and I should think with figures of this size it would be natural to infer that he might have had a lawyer talk to him, or, at least, an accountant. Now, if Mr. Prince had this nefarious purpose,

this crafty purpose, how simple it was to carry it out. I don't need tell Your Honor what is in my mind. How simple it would have been to let the money lie in the subsidiaries and not suck it up into the Maine Company. He could have let the earnings of the Transit Company lie there; Produce Terminal lie there; and, in particular, he could have let the earnings of the Jersey Company lie there. Certainly, certainly there was every reason why 14 millions of dollars should have been allowed to lie in the Jersey Company, because 14 millions is needed by that company in 1940 to pay its debts.

Is it credible that a crafty man planning, so to speak, to cheat the game on surtaxes should be so dumb and so stupid as to draw all that money up there when it is so simple to leave it behind? And then look at his stupidity in 1933. The enterprise as a whole in 1933, if Your Honor please, is some $80,000 in the red. It actually has no earnings. And what does Mr. Prince do? He sucks up to the Maine Company earnings from prior years and creates of his own free will this gorgeous apparent income, an actual income of the Maine Company so that a revenue agent may come around and say to him, "Ah, look, see this big income not declared out in dividends. You are cheating, Mr. Prince."

And so I say that the Exhibit 40 is a record of the fact that Mr. Prince couldn't have had any such intention. If he wanted to do what is complained of, it would have been so simple to do it simply by an action to let the money lie down in the lower levels.

And then once more Mr. Prince's intention was made clear when he was on the stand, and I am not referring, if Your Honor please, to the stereotyped answer to my usual question: "Did you intend to"—which the witness answers "No." I don't think such an answer particularly moving.

I suppose any taxpayer is apt to answer that stereotyped question that way, but I had the pleasure of asking Mr. Prince at the end of his testimony just what his intention was through the years, and I think the only disappointment that I have in the case is that the written record is so faint and so feeble in recording what happens in a court room. I don't need to remind Your Honor of it. You sat and heard it. But I would like to say his words over again when I asked him the question.

"Why, sir," he began, "Why, sir, I recognized as a man that had many years of experience in finance the obligations that I had before me to pay in 1939 and '40. I kept that continually before me. I recognized the responsibility that I had in carrying on that industry and in the association I had with the men who had been with me all my life to see that nothing happened to it. I used the best judgment I could to be conservative. Through all the troubles that we have had and the uncertainty, I tried to hold my ship to its course."

And even in this feeble way, I am glad to put it into the record, the fact that as I saw it and as I heard it, there was a little break in his voice, and that old man sort of drooped his head with the thought that he hated to think that he might somewhere have failed to hold his ship to his course. Now, what was that course to which he had been holding the ship? It is the course that had been marked out all through the years beginning in 1911, beginning with the purchase of New Jersey stock, his talks to Mr. McDonough, who is in the court room, his talks to Reimers, his talks to Mr. Leonard, his bank crisis, the levels on which the subordinated funds were deposited, all kinds of landmarks all along the way. That marked that man's course. I think all of us in this court room know that if Mr. Prince spoke the plain truth as he stood there and as we now know his

true reason for what he did, and that is his reason, this case is at an end.

Now, just one word about what he did in saving up to pay those debts. We may think, if we wish, that he was conservative. We may think that he was cautious. We may think, if we wish, that he was frightened in those bad years through that depression. But is there, I wonder, any one in the court room who thinks it was unreasonable—was it just plumb over, Mr. Clark, on the unreasonable side to keep his eyes fixed on that debt, as he said, "I kept that continually before me," and to plan for it and to save for it? I can't believe that that conduct was unreasonable.

One little thing I must mention—(After conferring with Mr. Green). I think I will mention to Your Honor this point of argument, Mr. Green, who is usually wiser than I, says I should save for rebuttal, and, apparently, I will have about ten minutes, and I think I shall.

Then just one last thing—

The Member: Will you tell me one thing, as to whether you think or as to whether you can say anything about a possible difference in the interpretation of the word "reasonable" when it is applied to the phrase "needs of the business" and the word "reasonable" as it is applied to the subjective thoughts of men; that is to say, beyond the reasonable needs of the business, are you necessarily importing a question as to the reasonable judgment of a man?

Mr. Welch: If Your Honor please, I think that must be so, because the tax is imposed because of an intention. Mr. Prince must have had, what the cases have called, a nefarious intention. Now, if the accumulations are unreasonable accumulations, they may be an indication of that intention. Now, Mr. Prince is the man at the one hand whose intention we are speaking for. Mr. Prince is at the other end, who, as a director, accumulates the funds, and I should

say that it is his conduct that is being tested, and that his conduct in accumulating funds must be unreasonable to test his conduct, and we do not think so much of the needs of the business in the abstract as unreasonable as we think of his conduct, because in the end it is this man's mind we are judging.

The Member: First, is it possible to interpret the statute, the statutory language, "beyond the reasonable needs of the business," that it is being the subject of a subjective test, regardless of the particular soundness of the judgment of the subjective test of the judgment of any one man.

I do not suggest that you deal with it now if you are not prepared. I will leave that for your consideration.

Mr. Welch: No. I think I will deal as best I can with anything Your Honor suggests.

The Member: Very well.

Mr. Welch: If you take the phrase "reasonable needs of the business" as meaning something that applies to plant, equipment, bank balances, and accumulations, and so forth, the needs of a business can't be translated into human activity except through the minds of men. The needs of a business, I take it, must be what the board of directors reasonably thinks its needs are. They may be other needs than that but they must always, at least, be that. If three of us in the room sit in a board of directors and were unanimous that this company needs, let us say, $1,000, I take it that is the need of the business. Now, if we are foolish and underestimate the needs of the business, through some clerical error, and we actually need $2,000, all right. We had a need of something short of what we thought; but, I take it, as you move in the realm of human relations, the best we can say in a court room of this character is that the needs of a business must be what its board of directors

reasonably think are its needs. And so I think in the end you come back pretty close to the standard of individual men.

I doubt somewhat the validity of what I am now about to say to you, but I do not want to sit down without saying it. Some one very much wiser than I am a long time ago said, "The power to tax is the power to destroy." And another man also very much wiser than I, in the Supreme Court, dissenting opinion, said, "Not so long as this court sits."

But I don't think I would be doing my duty to my client without indicating the gravity of the situation that would confront this company if this tax were imposed, and, secondly, the personal property tax of the New Jersey Company, of which there is not too much but some evidence, and if the tax of the personal holding company were imposed, which was put in evidence this morning—that is to say, the notice of the deficiency between now and 1946.

I do not know how valid the argument is, but I thought I had rather not sit down without saying to Your Honor that after a long study of this case I have reached the studied opinion that if all the taxes in this case now facing this company are actually imposed and collected, I believe this great industry will be broken up and that Mr. Prince will in the end have failed to hold his ship to its course.

Mr. Clark: May I ask Your Honor if I may have a few minutes' recess before I start?

The Member: Yes.

Mr. Clark: Just two or three minutes.

The Member: Very well.

(There was a short recess taken.)

Argument on Behalf of the Respondent.

Mr. Clark: I may seem a bit stilted in argument, Your Honor. I am going to try to keep very close to what I con-

sider are the essential points of the Respondent and do not intend to elaborate as I might in brief subsequently.

As I stated yesterday, Respondent was relying on all the provisions of section 104, except that the corporation was formed for the prohibited purpose.

Now, the deficiency notice specifically states that the corporation is subject to taxation under 104 of the Revenue Acts from 1928 to 1932.

Section 104, subsection (a), provides that if a corporation is formed or availed of for the purpose of evading imposition of a surtax upon its stockholders and allows gains and profits to accumulate instead of being divided or distributed, there would be levied 50 percent tax.

Subsection (a) is so enforceable independent of subsection (b).

Subsection (b) of the Act states that if a corporation is a mere holding or investment company or has accumulated its surplus beyond the reasonable needs of the business, then that is prima facie evidence to evade surtax.

Respondent relies on both subsection (a) and subsection (b) of 104.

Now, I have here, Your Honor, citations of a number of cases which have been decided in favor of the Government relative to section 104. I do not know whether Your Honor cares to have those read into the record or have them referred to in brief.

The Member: I don't care one way or the other.

Mr. Clark: I notice that in this amendment to Rule 35, of which I was totally unaware until yesterday afternoon, there was something about citations as well as argument. That is the reason I am mentioning this. I can read these in at this time.

The Member: I will be glad to hear what the cases are on which you rely.

Mr. Clark: Yes; I can state the cases; I cannot analyze them at this time.

Helvering v. *National Grocery Company*, 304 U. S. 282; *Williams Investment Company* v. *United States* (Ct. Cls. 1933) 3 Fed. Supp. 225; *United Business Corporation of America*, C. C. A. 2, 1933, 62 Fed. 2d 754; *Keck Investment Company* v. *Commissioner*, 1935, C. C. A., for the Ninth, 77 Fed. 2d 244; *A. B. Sanger, Inc.*, v. *Commissioner*, 1936 C. C. A. Fifth, 84 Fed.—must be Fed. 2d, of course—23; *Almours Securities, Inc.*, v. *Commissioner*, 1937 C. C. A. 3, 91 Fed. 2d. 427; *R. & L. Inc.*, v. *Commissioner*, 1936 C. C. A. 5, 84 Fed. 2d. 721; *deMille Productions*—I believe that is *Cecil deMille Productions*—

The Member: I think you are mistaken. I think that is William C. deMille.

Mr. Clark: I think you are right. In fact, I am sure you are right.

(Continuing)—1934, 30 B. T. A. 826; *Edward G. Swartz, Inc.*, 1935, 33 B. T. A. 355; *Rands, Inc.*, 1936, 34 B. T. A. 1094; *Nipoch Corporation*, 1937, 36 B. T. A. 662; *United Business Corporation of America*, 1935, 33 B. T. A. 83; *Reynard Corporation*, 1938, 37 B. T. A. No. 83.

Respondent's position is taken under the deficiency notice primarily on the grounds stated in (b) of 104. I believe that Mr. Pierson will have something to say about (a). I do not think that I have anything particularly to comment with regard to that.

It is Respondent's position that this was a mere holding company, and also that there was an accumulation of gains and profits beyond the reasonable needs of the business.

Relative to the first, as to whether it was a mere holding company, I would direct Your Honor's attention to the testimony, the exhibits, which show that the Petitioner was

formed in 1911 to acquire the capital stock of the New Jersey Company, which in turn—it was a holding company admittedly, and I understand it is admitted by Petitioner that Petitioner is a holding company. In any event the company whose stock Petitioner was formed to acquire was a holding company. That was in accordance with the plan of 1911. I haven't that exhibit number, but Your Honor is familiar with the facts in the record. With a guarantee of a fixed dividend rate on the common stock of the Jersey Company outstanding in the hands of the public.

Now, after the formation of Petitioner it continued to acquire the stock of the New Jersey Company, and it is Respondent's position that it exercised no other function besides the acquiring and holding other securities and making loans to its stockholder, Mr. F. H. Prince, who was for a part of the period here involved its sole stockholder, but throughout a large stockholder. Now, this, in Respondent's opinion, brings the Petitioner in the category of a mere holding company.

Throughout the years involved it had no managing staff or expenses incident thereto which would give any evidence of operating activities. The Petitioner has offered evidence to the effect that Mr. Prince, as president of the Maine Company, issued orders as to the conduct of the entire enterprise, whereas the consolidated returns of the New Jersey Company and its affiliates in the years in question show that he spent all of his time in conducting the activities of the New Jersey Company and its subsidiaries during the years and received substantial compensation therefor from these enterprises.

Now, passing to the question of the undue accumulation of gains and profits—

The Member: Mr. Clark, let me ask you one thing.

Mr. Clark: Yes, sir.

The Member: You dealt with the question that it was admitted that it was not formed for the purpose stated in 1911. I would like to know whether, since the Government, as I understand it, does contend that this corporation was during the taxable years availed of for the purpose as set forth in subdivision (a),—I would like to know whether the Government has formed an opinion as to when the purpose—it says it was availed of in the taxable years here in question, came into its history since it was not formed for that purpose; that is to say, there must have been a time between the early years when it was formed for some other purpose and the taxable years when it is said to have been availed of for the condemned purpose, when the purpose changed so as to bring it within the statute. Did it change only in the taxable year 1930, or was it in the taxable year availed of, as it had been availed of for years before, and, if so, when?

Mr. Clark: Well, I cannot point Your Honor to the precise year, but I would say unquestionably it was availed of prior to the taxable years, in this regard, at least—that is, loans to Mr. Prince, who was its stockholder during those years. That had been going on for years. I haven't the precise figures.

The Member: Well, that answers my—that is, the earmark of the applicability of the term "availed of" is the fact of loans made to its principal or sole shareholder, so that whenever that began the Government's position is that at that time there began the period when this corporation was availed of for the condemned purpose. Is that the idea?

Mr. Clark: Yes, sir.

Turning now to the matter of undue accumulation of profits and gains beyond the reasonable needs of the business: Throughout its existence and through the year 1933 the Petitioner had accumulated a surplus of approximately

27 million dollars on the paid-in capital of one million dollars, while paying dividends in a total amount of—well, in round figures—$6,350,000. During the taxable years here involved it had net income, in 1930,—and these again are in round figures,—of $2,968,000; in 1932, $2,172,000; in 1933, $2,243,000; and paid dividends of only $400,000 in each of these years. The cash balances were in none of these years less than $7,645,000. Mr. Prince's aggregated indebtedness to the Petitioner for the borrowings of cash and securities were, on December 31, 1930, $3,307,000; on December 31, 1932, $3,797,000; and on December 31, 1933, $5,100,000,—these again being in round figures.

In this connection, I would invite the attention of the Board to the National Grocery Company decision by the Supreme Court. In the course of the opinion it stated, referring to Mr. Cole: "He needed personally further sums and took these in the form of loans. In the tax year Cole borrowed from the corporation $140,000. His aggregate indebtedness in January 31, 1931, for borrowings during the seven years was $610,000. As was stated in United Business Corporation v. Commissioner, Supra, page 755, 'These loans are incompatible with the purpose to strengthen the financial position of the Petitioner, but entirely in accord with the testimony to get the equivalent of dividends under another guise.'"

In 1934,—and I refer to that because there has been so much conversation relative to this crisis in 1940,—in 1934 Mr. Prince borrowed an additional $850,000, in spite of all this discussion that has been had relative to that crisis in this country.

Now, the Respondent recognizes that the New Jersey Company and its affiliates has outstanding bond obligations maturing at dates subsequent to the taxable years, and that is in 1940, and also in 1945, I believe. A large amount of

this is the obligation of the New Jersey Company, which is admittedly a holding company, with no business purpose whatsoever.

The Petitioner could have partially liquidated the bonds of the New Jersey Company at prices below their face value, as the evidence shows, but did not do so. Petitioner also used its accumulated gains and profits in the purchase of miscellaneous securities which were wholly unrelated to the Stock Yards enterprise rather than in purchasing the bonds of the New Jersey Company and its affiliates, or distributing whatever earnings there were to the stockholder.

Now, so far as the Maine Company is concerned with relation to the bonds of the New Jersey Company, I wish to call Your Honor's attention to the fact that all liability for payment of the principal of the bonds of the New Jersey Company and its affiliates was specifically disclaimed by the Maine Company by the terms of the contract of October 1, 1914, which is the contract between the New Jersey Company and the Maine Company, and is Exhibit S-46 attached to the stipulation of facts, and I should like Your Honor's indulgence to read a portion thereof.

I am referring, as I say, to Exhibit S-46, attached to the stipulation, to page 4 thereof, and specifically to subsections (b), (c), and (d) under the No. 1, which is the paragraph number on that page. Reading, beginning at (b)—pardon me, I will start with paragraph 1.

"The Maine Company hereby guarantees to the New Jersey Company the prompt payment of the following."

Now, subsection (a), I think, I may pass as immaterial to this point.

Subsection (b): "The interest upon the said Five Percent Collateral Trust Gold Bonds and the said Four Percent Forty Year Mortgage and Collateral Trust and Refunding

Gold Bonds when and as the same becomes due and payable and the Maine Company further agrees to make the payments and to fulfill all of the obligations of the New Jersey Company under the mortgages and deeds of trust securing the said bonds except the payment of the principal of the said bonds.

"(c): All payments which the New Jersey Company may be required to make under and in accordance with Article 6 section 3 of the said mortgage and deed of trust from John A. Spoor, Frederick S. Winston, and the New Jersey Company to the Standard Trust Company of New York dated 1st March, 1908, and all other payments other than the principal of the said first mortgage Five Percent Twenty Year Real Estate Improvement Bonds which the New Jersey Company may be required to make under and in accordance with the covenants contained in the said mortgage to be performed by the New Jersey Company.

"(d): All payments which the New Jersey Company may be required to make by virtue of its guarantee of the interest but not of the principal of the said $2,327,000 First Mortgage Four Percent Forty Year Gold Bonds of the Chicago Junction Railroad Company."

Now, from 1917 to 1933 the Petitioner accumulated huge surplus, and it is the Respondent's position that this accumulation was for the purpose of preventing the imposition of surtax on its stockholders.

And now I had passed for the moment to something which would fall under subsection (a) of 104 rather than (b). I had forgotten that I was to make no comment on that.

In the years 1930, 1932, and 1933 the stockholders would have been liable for additional surtaxes if the entire gains or profits had been distributed in the amount of $2,479,000, approximately.

Respondent admits that the purchase of securities by Petitioner from F. H. Prince, thereby enabling him to do, as he did, deduct large losses on his individual income tax returns definitely brings the Petitioner within the scope of subsection (a) of 104 for the reason that the Petitioner's gains or profits were accumulated and used by Petitioner to prevent the imposition of surtax or any internal revenue tax upon its stockholder.

The Member: Mr. Clark, I don't think I understand that. The failure to distribute enabled Prince to deduct large losses, you say. Is that right?

Mr. Clark: Yes, Your Honor.

The Member: I don't understand that.

Mr. Clark: Well, now, I will tell you, Mr. Pierson has something to add at this point, and, as I say, I had not anticipated to go into subsection (a) myself. Perhaps if Your Honor will indulge me I will leave it to him to take that up.

The Member: I want to understand you as you go along.

Mr. Clark: Yes, because I have nothing further to say.

The Member: Mr. Pierson.

Mr. Pierson: If Your Honor please, in that regard I can probably state it more succinctly in this way: The corporations' gains or profits are allowed to accumulate, they stand in the corporation as such, they take those gains or profits and purchase securities from their sole stockholder, that is, using these gains and profits to purchase those securities from the sole stockholder, upon which the sole stockholder deducts a loss in his individual income tax return. Now, it seems to me that that is using the corporation for the prohibited purpose, it allows its surplus to accumulate and then takes its surplus and buys securities from F. H. Prince, and he takes losses on his income tax return.

Mr. Clark: That concludes the Respondent's statement.

The Member: Is that all you have to say? I understand that is your answer to my question. Is that all your argument?

Mr. Pierson: Yes, Your Honor.

Mr. Welch: I think I have about 10 minutes available.

The Member: Yes, sir.

Mr. Welch: The section of the argument that I reserved, thinking that the subject might be brought up by my brother, was a short section, that of dealing with the loans by this corporation from F. H. Prince & Company, and I would like, in turn, once more, at the risk of boring Your Honor, to read what my brother read from the National Grocery Company case v. Helvering.

"He needed personally further sums"—meaning Cole needed—"he needed personally further sums and took these in the form of loans. In the tax year Cole borrowed from the corporation $140,000. His aggregate indebtedness in January 31, 1931, for borrowings during the seven years was $610,000."

Now, the significance of a loan by a corporation to a stockholder is found in those words "he needed personally." And I have always thought that the loans in the Grocery case, as we call it, must have been the thing that left this Board no alternative.

But I would like to compare the loans in this case with the loans in the Grocery case. I have no doubt Your Honor has them well in mind. They were regular loans. They came year by year. No interest was ever paid on them. They had no security. And while Your Honor did not go that way, I can understand a Member of the Board saying: "They look too much to me like dividends in the form of loans. I don't like it." But compare them to the loans in

this case. Did Mr. Prince need that money personally? Oh, no. The need was the need of the Maine Company to have someone friendly to it buy the Armour & Company and stop the threatened practice of diverting shipments from that great market, to the injury of the market, the farms that patronized it, and Armour & Company itself, in the end. Mr. Prince did not get that money and spend it for champagne or for luxury. That loan was devoted absolutely to the purposes of the company, and it loses all significance of whatever sort when you see, as the evidence shows, what the purpose was. Similarly, the series of loans of $2,300,000 in the Armour transaction.

There is, however, one little blemish on my case, and except for that one little blemish I think it is a truly beautiful case.

I suppose that I must say that Mr. Prince needed $160,000 to buy the Newport house. I hate to say it because way down underneath I don't think it is true, but he took that sum—he took that loan from the Maine Company temporarily until he sold his old home Princemere to repay it. Now, it wasn't like the loans in the Grocery case, unsecured. It wasn't like the loans in the Grocery case, free of interest. It wasn't like the loans in the Grocery case, one of a long series, year by year, which made it look as if Mr. Koch was living on his loans. It was this sporadic temporary one, only secured and paying interest.

But I do say I think it is a little blemish on my otherwise beautiful case. The first expert for the Government, I thought, took care of that. I think Your Honor has the question in mind that I put to him, and he said to me quickly that the figures in this case were so large that the sums of $160,000 no matter where found could not actually be said to be a truly significant item. And so I say I have my little blemish. One never sees the perfect lawsuit else

they wouldn't come into court, but since it is sporadic, since it was intended to be temporary, since interest was paid on it, and since the Government's own witness said it was an insignificant figure, I sit down with some confidence, saying that I admit my little blemish, but I think that it is trivial and insignificant.

The Member: You both know what the rule provides as to the time for submission of briefs?

Mr. Clark: I understand from the revision of the rules, of which copies I got last night, that each side is given 45 days under the rule.

The Member: That is right.

Mr. Clark: Now, I wonder if we can't have a little more time on this case, Your Honor.

The Member: You can if you need it. I may say this—

Mr. Clark: I don't want to delay—

The Member: Division No. 10, of which I happen to be the entire membership, is fairly current in its decision of the cases that are under submission. We are waiting now mostly for Government briefs in the cases in order to be able to decide them, and that being so, I want to delay as little as possible.

Mr. Clark: Yes, sir.

The Member: That is to say, as little as possible consistent with a good job on the part of Counsel because after all the function of the briefs is to assist the harassed Member in arriving at a conclusion from a voluminous record. That is what I want briefs to be filed for, and I want them filed as well as they can be for that purpose, and you may have all the time that that requires provided I can be assured that you take no more than that.

Mr. Clark: Well, I will tell Your Honor what I am sure you will appreciate. Under circumstances as they were

prior to the first of the year, I could tell pretty well where I was going. At the present time, however, and beginning with the first of the year, Mr. Pierson went to Cincinnati. I went to Detroit. We each have to return to our post of duty. What arrangements we can make—I say "can make"—what arrangements we may make with reference to working together with Mr. King, who is also assigned in Detroit, when we must have access to the exhibits which have been filed here, and I refer to our own exhibits largely, the income tax returns, because the Petitioner has very kindly furnished us with copies of the exhibits they filed. I don't know but it is due to that factor and the uncertainty connected therewith that I make that suggestion.

Now, I am just wondering how long I ought to ask for, and I do not want to impose on the Board in that regard. I am sure you appreciate that.

(Counsel for Respondent confer.)

Mr. Clark: Well, Your Honor, all I can say at the moment is this: We will have to discuss the matter with the assistant head of the Appeals Division to see what arrangement can be made in that regard. Now, I don't know whether to suggest that we be granted 60 days at this time with a privilege to move for some reasonable further time, if necessary—I am afraid that that is what I will have to do because I don't know. I will have to talk with him about that.

Is there any objection on the part of Counsel for Petitioner to that?

Mr. Welch: I am torn between two things. I don't think it is out of order to say that a decision in this case reasonably in the near future one way or the other would be welcome. Some cases have been held in the Board for many, many months, and that will be awkward here. On the other

hand, Mr. Green and I are anxious to go away, as I said this morning, in your absence, so that my personal desires are in conflict with those of my client, and my client, in substance, is in the room and hears me confess it.

I should prefer a fixed date and no asking for extension, and I would think, take a somewhat longer period than you suggest provided it was fixed, either 10 or 15 days more, if you felt that you should have it, Mr. Clark.

The Member: I may say that the difficulty that we have had is that no matter how fixed a date is, it seems to be fixed on shifting sands, because when the due date arrives, it is immediately the action of one party or the other, and it is usually the Respondent, as Mr. Clark well knows, who postpones the fixed date by failure to file, and so we have to wait.

Now, after all, one of the difficulties of the nature of this Board is that it can't require anybody to do anything. If we say that the time is fixed, we are speaking only hopefully. We can't enforce it.

I would like to have assurance, and I suppose that the nature of the tremendously large organization such as the Government has in these cases, there may be as much as I can get now an assurance that whatever date is fixed will be the date upon which I can find a brief filed with the clerk so that I can get to work on it. I can only express hope.

Mr. Clark: I will tell Your Honor what my thought is. Whether I can carry it through, I don't know. My thought is that Mr. Pierson and Mr. King and I should come back here to Washington and work here on the brief at some reasonably near date in the future. If permission for that is granted, we will be in a different position from that occupied by us when we were permanently located here because we won't have anything else to do, and we can get right down to business without interruptions on a whole lot of

details which always delays work on briefs, as I have known for years, and that Your Honor is aware of.

The Member: One of the other things that delays work is the statement almost always iterated and reiterated that we have to wait two weeks for the Stenographer's minutes. We got daily copy in this case, and here are the Stenographer's minutes, which I am holding aloft in the court room. So that factor is out.

Mr. Clark: Of course, this is a very substantial case.

The Member: Yes.

Mr. Clark: The record is substantial and exhibits are numerous. I believe that I would suggest 3 months, if that is agreeable to Your Honor.

The Member: Now, Mr. Welch, what do you say to that?

Mr. Welch: I observed a violent signal from the back of the room from my client, who reminds me constantly that in the sad event of loss, we have tremendous interest to pay. That sounds like too much time.

The Member: I was surprised that nobody mentioned that before. But if the Government is entitled to this deficiency it will get interest. If the Government is not entitled to this deficiency, Petitioner is saved interest. And in either event, the amount is large, so that I suppose a month is a long period of time over which to calculate whether you are going to pay or save interest. So that is a factor. But, after all, you gentlemen are the ones who are interested. I will decide this case just as promptly as it is submitted to me, and I will leave it to you to say when it shall be submitted.

Three months has been suggested. What do I hear in response to that?

Mr. Welch: Sixty days seems to be the maximum. I don't suppose Your Honor would wish to take it without briefs?

I would be glad to submit it on the oral argument, myself. I have little confidence in briefs on facts.

The Member: If I had more self-confidence I might take it that way, but I feel no assurance in these cases, and I need the assistance of able counsel on both sides to promote the interests of their respective sides, and tell me why I should be persuaded in their behalf.

Mr. Welch: I cannot go beyond sixty days.

The Member: I should think that sixty days would be as much as they should be asked to give.

That will be suppose we say April 17th, which is Monday. That means, according to the new rule, that the briefs of both sides shall be filed at that time, and in view of the underlying purpose of that provision of the new rule, I shall direct the clerk that the briefs shall not be served upon the opposing side until both briefs are filed. After the briefs are filed and served the both sides will have, contrary to the rule, 20 days within which to file their respective replies.

The Clerk: Twenty days instead of the fifteen prescribed?

The Member: That is right.

Thereupon, the proceedings will stand submitted.

The case is thus closed.

(Hearing concluded.)

VOLUME III

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 488

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHICAGO STOCK YARDS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 23, 1942
CERTIORARI GRANTED DECEMBER 7, 1942

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3730.

CHICAGO STOCK YARDS COMPANY,

PETITIONER FOR REVIEW,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS.
DECISION, MARCH 29, 1941.

RECORD ON PETITION FOR REVIEW.

VOLUME III.

Pages 901 to 1261, inclusive.

JOSEPH N. WELCH,
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ASSISTANT ATTORNEY GENERAL,

J. LOUIS MONARCH,
SPECIAL ASSISTANT TO THE ATTORNEY GENERAL,
for Commissioner of Internal Revenue.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK
1942.

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UNITED STATES BOARD OF TAX APPEALS

CHICAGO STOCK YARDS COMPANY, PETITIONER, *v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

[COPIES SERVED ON BOTH PARTIES.]

[Docket No. 87797. Promulgated March 20, 1940.]

The petitioner is a holding or investment company which had on December 31, 1929, a surplus of $19,615,905.69 and a capital surplus of $6,450 over and above its liabilities and a paid-in capital of $1,000,000. *Held*, that the petitioner had no need for the accumulation of gains and profits beyond the amount accumulated to December 31, 1929, and a further accumulation of profits in subsequent years was beyond the reasonable needs of the business, and that during the years 1930, 1932, and 1933 the petitioner was "availed of" for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, within the meaning of section 104 of the Revenue Acts of 1928 and 1932.

JOSEPH N. WELCH, ESQ., EDWARD J. KEELAN, JR., ESQ., LAWRENCE E. GREEN, ESQ., JOSEPH K. MOYER, ESQ., and FRANCIS B. KEENEY, ESQ., for the petitioner.

PHILIP M. CLARK, ESQ., and STANLEY B. PIERSON, ESQ., for the respondent.

The respondent has determined deficiences of $1,817,686.10, $1,301,638.97, and $1,147,111.92 in petitioner's income taxes for the years 1930, 1932, and 1933, respectively. All issues have been settled by stipulation except one arising from respondent's determination that petitioner is subject to tax under section 104 of the Revenue Acts of 1928 and 1932.

Findings of Fact.

1. The petitioner is a corporation, organized under Maine law on September 26, 1911, in pursuance of a plan dated June 30, 1911, in the form of an agreement between a committee acting on behalf of the petitioner, if and when formed, and the holders of the common stock of the Chicago Junction Railways & Union Stock Yards Co. (hereinafter called the Jersey Co.). The powers of the petitioner, as stated in its charter, include the carrying on of many kinds of active business, including the purchase and lease of real estate, the holding of stocks and bonds of other corporations, the guaranteeing of obligations of others, and the carrying on of any other business which might seem to the company convenient to enhance the value of its properties.

2. The Union Stock Yards & Transit Co. of Chicago (hereinafter called the Transit Co.) is a corporation, organized under special act of the Illinois Legislature on February 13, 1865. From 1911 through 1933 it had issued and outstanding 132,000 shares of common stock of a par value of $100 per share. Under its charter it has power to operate stockyards and a belt line railroad and to borrow money to an amount not in excess of $500,000. It has continued to operate the stockyards to the present date. On January 1, 1930, it had outstanding debenture notes in the amount of $500,000, which were paid off in that year, and it did not have any outstanding bond or note obligations thereafter. During the years 1911-1913 more than 98 percent of the capital stock of the Transit Co. was owned by the Jersey Co., and since December 31, 1913, the Transit Co. has been wholly owned by the Jersey Co.

3. The Jersey Co. is a corporation, organized under New Jersey law on July 10, 1890, for a period of 50 years. It was formed at a time when the meat packers having plants in Chicago west of the stockyards, known as Packingtown,

had instituted suits to compel the railroads to switch their freight without charge and to have the stockyards declared a nuisance, and had threatened to move to Indiana, where they had purchased and developed a tract of land at a cost of about $1,000,000. At all times the authorized and issued capital stock of the Jersey Co. has consisted of 65,000 shares of preferred stock of $100 par value and 65,000 shares of common stock of $100 par value, a share of each class being entitled to one vote. On July 10, 1890, the Jersey Co. issued $10,000,000 5 percent collateral trust gold bonds due July 1, 1915, and on July 15, 1892, it entered into an agreement with certain packers whereby the Jersey Co. agreed to and did pay $3,000,000 in 5 percent bonds due July 1, 1907, and the packers agreed to and did continue to keep their businesses in Packingtown for 15 years from July 1, 1891. Similar arrangements with other packers were also made in the years 1892-1901, for periods of from 5 to 20 years, the Jersey Co. paying in all $4,665,000 in cash and bonds and other property to the packers. In 1909 the issuance of $14,000,000 new 40-year 4 percent bonds was authorized, $4,000,000 of which were issued. In 1915 the remaining $10,000,000 were issued to retire the $10,000,000 5 percent bonds which matured in that year. Owing to the high rates of interest at which money was loaning at the time, the new issue carried an interest rate of 5 percent.

4. The Chicago Junction Railway Co. (hereinafter called the Railway Co.) is a corporation, organized under Illinois law on April 26, 1898, as a consolidation of two corporations which were wholly owned by the Jersey Co. One of these was the Chicago Hammond & Western Railroad Co., which owned a belt line railroad (known as the "Outer Belt") in Chicago and its vicinity. The other was the Chicago & Indiana State Line Railway Co., which operated another

belt line railroad (known as the "Inner Belt") in the same vicinity, directly serving the Chicago stockyards under lease from the Transit Co. dated December 15, 1897. The Railway Co. had an authorized and issued capital stock of $2,200,000, divided into 22,000 shares of $100 par value, until 1913, when 33,000 additional shares were issued as a stock dividend to the Jersey Co. The Railway Co. has been at all times wholly owned by the Jersey Co. During the years 1930-1933 the Railway Co. had no outstanding indebtedness. The "Outer Belt" line was sold in 1907.

On December 1, 1913, the Transit Co. leased its "Inner Belt" line to the Railway Co. at an annual rental of $600,000, and on May 19, 1922, the Transit Co. and the Railway Co. entered into a lease under which the "Inner Belt" line was leased by them to the Chicago River & Indiana Railroad Co., wholly owned by the New York Central Railroad Co., for 99 years at a rental, guaranteed by the New York Central, of $1,500,000 for the first year and $2,000,000 for each year thereafter, the lessee to pay all maintenance charges and taxes. On May 16, 1922, the Interstate Commerce Commission authorized the lease, subject to the conditions, among others, that nothing should be construed as a finding that the rental was just and reasonable and that any person having an interest in the subject matter might at any future time make application for such modification of the conditions as might be required in the public interest. Jurisdiction was retained to reopen the proceeding on the Commission's own motion for the same purpose. The application of the New York Central for authority to buy the Railway Co. properties under an option given with the lease was denied, without prejudice to future proceedings.

5. The Chicago Junction Railroad Co. (hereinafter called the Elevated Co.) is a corporation, organized under Illinois law on November 20, 1902, for the purpose of provid-

ing elevated passenger service through Packingtown. It was created after the city of Chicago had passed an ordinance requiring that all the railroad tracks in Chicago be elevated and after the Transit Co. had elevated its freight tracks. On September 30, 1903, the Elevated Co. leased its properties to the South Side Elevated Railroad Co., which connected with lines running all through Chicago, and on March 1, 1905, the Elevated Co. issued $2,327,000 first mortgage 4 percent 40-year gold bonds, due March 1, 1945, and guaranteed by the Jersey Co. The rental was the payment of taxes and interest on the Elevated Co. bonds. During the years 1930-1933 the Elevated Co. had outstanding capital stock of $50,000, which has been at all times wholly owned by the Jersey Co.

6. The Stock Yards Harness & Saddlery Co. (hereinafter called the Harness & Saddlery Co.) is a corporation, organized in Illinois in 1903. It is a small company and has continually been wholly owned by the Transit Co.

7. Central Manufacturing District (hereinafter called the District) is a real estate trust with transferable shares, created by the transfer to trustees on May 2, 1902, of real estate northwest of and adjacent to the stockyards, the Jersey Co. being the sole beneficiary. This real estate and another tract later acquired were vacant land which was acquired and used for development into a manufacturing district to provide additional tonnage for the "Inner Belt" line. The District has its own streets and police, water, lighting, and sewerage facilities. The District constructs buildings for lessees, the petitioner assisting in financing if the District does not have sufficient funds. The District had outstanding bonds of $2,915,000 in 1930, $2,700,000 in 1931, $2,475,000 in 1932, and $2,250,000 in 1933. These bonds were guaranteed by the Jersey Co.

8. The Produce Terminal Corporation (hereinafter

called Produce Terminal) is a corporation which was organized under Illinois law on March 4, 1915, pursuant to an order of the Illinois Commerce Commission to carry on the business of supplying electric light and power to the Chicago stockyards, this having been formerly done by the Transit Co. During the years 1930-1933 Produce Terminal's capital stock was $2,000,000, consisting of 20,000 shares, of which 7,170 shares were issued in 1927 as a stock dividend to petitioner. Produce Terminal was wholly owned by the Transit Co. from the date of its formation until 1924, when all its shares were distributed by the Transit Co. to the Jersey Co. as a dividend. On December 31, 1926, the Jersey Co. distributed those shares to the petitioner as a dividend and Produce Terminal has since been wholly owned by the petitioner. Although this stock was entered on the petitioner's books at a value of $499,031.29, its value when distributed was actually $1,032,431.95.

9. When the Jersey Co.'s 1892 contracts with the packers came to an end in 1907 the packers asked for a further share in the profits of the stockyards, and after efforts of F. H. Prince, a stockholder of the Jersey Co., Armour,[1] one of the packers, became a shareholder of the petitioner, the packers then continuing to do business at the stockyards.

10. Under the plan for the formation of the petitioner dated June 30, 1911, the common stockholders of the Jersey Co. were offered the guaranty of the petitioner, by way of stamp on their stock certificates, of 8% annual dividends or the privilege of exchanging their shares at the rate of one share for $200 face amount of 50-year 5 percent collateral trust bonds of the petitioner.

On September 27, 1911, the petitioner agreed with Frank

[1] There are several places in the record where it is not clear whether the individual J. Ogden Armour is meant or the corporation Armour & Co. Since for present purposes the distinction has no importance the name Armour is used equivocally to apply to either.

R. Pegram, as agent for Prince, to buy from him the plan and the assents of more than 60,000 common shares of the Jersey Co., plus $1,000,000 in cash, for $8,000,000 par value of the petitioner's capital stock. On the same day the petitioner agreed with the Jersey Co. common stockholders to pay holders of stamped certificates a 2¼ percent quarterly dividend, to stamp certificates, upon presentation, with the guaranty of the petitioner, that the guaranteed shareholders sold all their rights to dividends upon the guaranteed shares, that all dividends on such shares were to be used first to pay the 9 percent guaranteed dividends, the residue to be retained by the petitioner, the petitioner to secure its 5 percent bonds by unstamped Jersey Co. $100 common stock for each $200 face amount of bonds or by shares of Jersey Co. $100 preferred stock for each $120 face amount of bonds, and that the petitioner might withdraw the right of exchange on 30 days' notice. Also on September 27, 1911, the petitioner issued $1,000,000 par value of its capital stock for $1,000,000 cash.

On October 2, 1911, the petitioner executed a trust indenture providing for the issuance of $13,000,000 5 percent 50-year callable gold bonds, secured by all the Jersey Co. common shares owned or thereafter acquired by it; it was required to do whatever might be necessary to maintain or preserve the corporate existence of the Jersey Co., but not to prevent the consolidation or merger of the Jersey Co. with, or the sale, or transfer of its property to, the petitioner.

11. On November 11, 1911, the petitioner's capital stock was increased from $1,000,000 to $8,000,000, divided into 80,000 shares of common stock, and on March 21, 1912, $7,000,000 of its stock was issued in payment of the plan of

the owner of 64,480 shares and Armour was owner of the remaining 15,520 shares.

12. By August 31, 1914, the petitioner had acquired in exchange for its bonds 31,079 Jersey Co. common shares and 33,922 shares had been stamped with the guaranty; in July 1919 it acquired the remaining three shares.

13. On October 1, 1914, the petitioner and the Jersey Co. made an agreement whereby the petitioner guaranteed the interest upon the Jersey Co.'s bonds; promised to fulfill all obligations of the Jersey Co. under the deeds of trust, except the payment of principal of the bonds; guaranteed all payments the Jersey Co. might be required to make by virtue of its guaranty of interest, but not of principal of $2,327,000 bonds of the Elevated Co., and guaranteed 6 percent dividends on the Jersey Co. preferred stock and 9 percent dividends on whatever Jersey Co. common stock the petitioner had not acquired. The Jersey Co. assigned to the petitioner all of its right to dividends thereafter declared or distributable by the Transit Co. and the Railway Co. and directed those companies to pay certain specified amounts of interest on the Jersey Co. bonds, and dividends on the Jersey Co. preferred stock and such common stock as the petitioner had not acquired, and to pay any surplus to the petitioner upon its request. The Jersey Co. promised to direct the Railway Co. to apply $600,000 annual rent payable by the Railway Co. to the Transit Co. under the lease of the latter's properties to interest on the Jersey Co.'s bonds, and to use its own income first to pay its own expenses and taxes, and then to pay the surplus to the petitioner upon its request.

14. On October 15, 1921, the petitioner issued to F. H. Prince & Co., an enterprise engaged until 1931 in the brokerage and banking business, with seats on the New York, Boston, and Chicago Stock Exchanges, entirely owned by

F. H. Prince, $1,500,000 face value 10-year 7 percent serial debentures in partial payment at par of a debt then owed by the petitioner to F. H. Prince & Co. On June 1, 1922, the petitioner issued $2,000,000 face value 10-year 7 percent serial debentures, of which $1,500,000 were used to retire the issue of October 15, 1921, and the remaining $500,000 were issued to F. H. Prince & Co. in partial payment at par of a debt then owed by the petitioner to F. H. Prince & Co. In December 1922 the $2,000,000 face value of bonds dated June 1, 1922, were reacquired by the petitioner for $1,860,000, and were set up on its balance sheet in that year as treasury bonds in the amount of $1,860,000. By the end of 1933 the petitioner had reacquired $3,642,000 face value of its own 5 percent bonds for $3,165,286.14 cash.

15. On February 27, 1920, Armour, holding 15,520 of the petitioner's 80,000 outstanding common shares, was ordered by a consent decree in the so-called Packers Case to dispose of them. On November 2, 1920, Armour and Prince agreed that Armour should receive preferred stock of the petitioner in exchange for the 15,520 common shares, and, with the court's approval dated February 24, 1921, Armour retained in the earnings and assets of the District and Produce Terminal the same proportionate interest as it had as owner of the 15,520 common shares, and Prince bought the 15,520 shares in June 1922 for $1,500,000, thus becoming the sole owner of the petitioner's common stock. Armour received from Prince $300,000 in cash and $2,000,000 in bonds of the petitioner which Prince had received from F. H. Prince & Co. Under an agreement dated May 11, 1922, between the petitioner and the Central Manufacturing District Co., a Delaware corporation with an authorized capital of 8,000 no par shares,[2] and an agreement dated June 2, 1922, between Prince, Armour, and the peti-

[2] This corporation is not the real estate trust herein called the District

tioner, 6,448 Central Manufacturing District Co. shares were issued to the petitioner and 1,552 shares to Armour in partial payment for the 15,520 shares of petitioner purchased by Prince. Under the agreement of May 11, 1922, the petitioner assigned to the Central Manufacturing District Co. all its rights in respect of dividends and liquidation distributions made by the District and by Produce Terminal. The petitioner in 1925 purchased the 1,552 shares of Central Manufacturing District Co. from Armour for $500,000 and in 1930 sold them for $26.92, and charged off the balance.

16. On June 1, 1932, F. H. Prince & Co., Inc., was organized under the laws of Maine, and its entire capital stock of 20,000 shares was issued for 48,000 common shares of the petitioner owned by Prince. On June 3, 1932, Prince transferred to himself and his wife as trustees under a deed of trust, of which his relatives and friends were the beneficiaries, the 20,000 shares of F. H. Prince & Co., Inc., and since that date Prince has owned no stock in that company and the trustees have been the sole stockholders. From December 19, 1932, to December 31, 1933, the following persons were officers and directors of F. H. Prince & Co., Inc.: F. H. Prince, president and director; F. H. Prince, Jr., vice president and director; James A. McDonough, secretary-treasurer and director; John F. Dana, clerk; Abbie Norman Prince, director; Frank R. Pegram, director.

17. Throughout the years 1929-1933 the Jersey Co. owned all the capital stock of the Transit Co. (which owned the Harness & Saddlery Co.), the Railway Co., and the Elevated Co., and all the shares of beneficial interest in the District. During this period, under a mortgage and deed of trust dated April 10, 1900, and a supplemental mortgage and deed of trust dated April 1, 1915, the Jersey Co. had outstanding $14,000,000 face value of its noncallable bonds

maturing April 1, 1940, of which $10,000,000 bore interest at 5 percent, and $4,000,000 at 4 percent and, as collateral security for these bonds, had pledged 131,083 of the 132,000 outstanding shares of the Transit Co., 54,991 of the 55,000 outstanding shares of the Railway Co., and $2,500,000 face value bonds of the Indiana Harbor Belt Railway Co., maturing in 1957 and guaranteed by the Lake Shore & Michigan Southern Ry. Co., and Michigan Central R. R. Co.

18. During 1929 the Transit Co. had outstanding $500,000 face value debenture notes which matured in 1930, and throughout the years 1929-1933 the Elevated Co. had outstanding $2,327,000 of first mortgage 4 percent bonds issued March 1, 1905, maturing in 1945, and guaranteed by the Jersey Co.

19. On December 31, 1929, the District had outstanding $3,909,000 of bonds bearing interest at different rates between 5 and 6 percent, guaranteed by the Jersey Co., and maturing on March 1 of each year until 1941 as follows:

1930	$994,000	1939	$295,000
1931	215,000	1940	185,000
1932-1938 (each year)	225,000	1941	735,000

On June 6, 1931, the District became the owner of all of the capital stock of two Illinois corporations; the Central Storage Corporation and the Central Storage & Forwarding Corporation; the former was merged into the latter on December 31, 1931, and the District has since been the sole owner of the surviving corporation.

20. On October 29, 1931, the Pau Corporation was organized under Illinois law, with a capital stock of $5,000. F. H. Prince & Co. was and is the sole stockholder. The Pau Corporation was formed to take over the easements covering the properties served with light and power by Producer Terminal. With money loaned to it by the peti-

tioner, the Pau Corporation purchased machinery which was installed in the plant of Produce Terminal. The petitioner received no interest upon the loans.

21. Western Associates, Inc., a corporation wholly owned by the petitioner, was organized in January 1933 under Delaware law to enable the petitioner to hold the shares of the Stock Yards Bank & Trust Co., which was formed on January 1, 1933, as a consolidation of the Stock Yards National Bank and the Stock Yards Trust & Savings Bank, and later to hold the shares of the Live Stock National Bank of Chicago. It received $1,500,000 from the petitioner on the issue of its 40,000 shares of capital stock and immediately paid it to the Stock Yards Bank & Trust Co., a bank organized under Illinois law and located in the stockyards district of Chicago, for 40,000 shares of that corporation's capital stock. In April 1933 the Stock Yards Bank & Trust Co. was reorganized, and Western Associates, Inc., received in exchange for the shares of that bank 40,000 shares of the capital stock of the resulting Live Stock National Bank of Chicago. Western Associates, Inc., has owned these shares since that time.

22. On December 31, 1929, the structure of the Chicago stockyards enterprise was as follows:

A. The petitioner, upon a paid-in cash capital of $1,000,000, had an earned surplus of $19,615,905.69 and a capital surplus of $6,450. It owned all of the capital stock of Produce Terminal, carried at a value of $1,032,431.95, and Central Manufacturing District Co., carried at a cost of $506,448; 58,742 Jersey Co. common shares out of 65,000 outstanding, carried at a cost of $10,993,551.74; and 457 Jersey Co. preferred shares out of 65,000 outstanding, carried at a cost of $45,821.50. The Produce Terminal was a prosperous corporation. It had net earnings of $262,213.73 for 1929 and annual average earnings of $172,517.68 for

the five-year period ended with 1929. It paid dividends to the petitioner from 1928 to 1933, inclusive, at the rate of $200,000 per annum. Its excess of assets over liabilities at December 31, 1929, was $2,552,017.05, although carried on the petitioner's books at a value of $1,032,431.95.

The petitioner had outstanding at December 31, 1929, 5 percent bonds in the amount of $3,227,000. Its excess of assets over all liabilities, including its capital stock on that date, was $19,622,355.69.

B. The Jersey Co. owned all the shares of capital stock of the Transit Co., the Railway Co., the Elevated Co., and the beneficial interest of the District. It filed a consolidated return for 1929, which included the operations of the above named wholly owned subsidiaries (including therein the operations of the Harness & Saddlery Co., a subsidiary of the Transit Co.) and showed a net income of $2,835,382.71 for the entire group. The group had outstanding bonds and debenture notes as follows:

Jersey Co. 5% bonds maturing 4/1/40	$10,000,000
Jersey Co. 4% bonds maturing 4/1/40	4,000,000
Elevated 4% bonds maturing 3/1/45	2,327,000
District bonds maturing at various dates	3,909,000
Transit Co. debenture notes maturing 1930	500,000
Total	20,736,000
Net consolidated assets	$73,322,871.58
Net consolidated liabilities	33,191,175.08
Excess of assets	40,131,696.50

C. Against the total bonded indebtedness of $23,963,000 standing against the entire group of companies, were the following liquid assets:

Petitioner	
Cash	$6,689,304.20
Accounts receivable	252,447.08
Notes receivable (Prince)	3,104,400.00
District 6's 1930	27,000.00
District 5's	55,733.00
Transit Co. 5½'s	15,022.50
Other investments	1,467,338.35
Produce Terminal	
Cash	499,575.93
Total	12,110,821.12
Jersey Co. and subsidiaries [1]	9,594,363.94
Total	21,705,185.06

[1] Includes impounded charges of $2,013,523.34 which were not released to the Transit Co. until 1932.

In addition to the above, the petitioner and the Jersey Co. and its subsidiaries owned fixed and other assets of a book value of approximately $40,000,000.

23. During the years 1930, 1931, 1932, and 1933 the petitioner, the Jersey Co., and some of that company's subsidiaries had large deposits in banks in the stockyards district or its vicinity. The petitioner and some of the subsidiaries of the Jersey Co. owned shares of stock in such banks. If the banks failed the depositors stood to lose a large part of their deposits and the stockholders might be subject to a 100 percent assessment upon their stock. Prince believed that it was necessary to protect these banks. He was particularly interested in maintaining the solvency of the Stock Yards National Bank, which was known throughout the country as the Stock Yards Bank. The failure of that bank would be a serious blow to the Jersey Co. and its subsidiaries.

In order to assist the banks the Transit Co. in 1930 paid $464,000 for shares of capital stock of Stock Yards National

Bank and purchased real estate bonds from the Stock Yards Trust & Savings Bank for $100,000.

In 1931 Produce Terminal purchased from the Central Manufacturing District Bank real estate bonds for $490,000 cash. In 1932 the petitioner purchased notes of individuals and corporations from the Central Manufacturing District Bank, paying therefor $501,439.58. These were carried in its balance sheet at December 31, 1932, at a value of $327,307.55. The petitioner loaned $3,071,779.19 to the Stock Yards National Bank and the Stock Yards Trust & Savings Bank. The Transit Co. during this year purchased debentures of the Stock Yards Investment Co., an affiliate of the Stock Yards National Bank, for $1,340,000 and Produce Terminal purchased similar debentures for $350,000.

In 1933 the Transit Co. loaned to the Stock Yards Bank & Trust Co. $1,016,414.84 in Government bonds. This loan became a loss to the Transit Co. in 1933. The banks needing further assistance, the petitioner agreed to subordinate $1,800,000 of its deposits in the Live Stock National Bank to the claims of other depositors. The Transit Co., Produce Terminal, and District likewise subordinated deposits in the amounts of $1,300,000, $300,000, and $600,000, respectively. The subordinated deposits were to be paid only out of certain assets which the bank was not allowed by the bank examiners to treat as good assets. The agreement for the subordination of the deposits was that the repayment would be made by the bank out of recoveries from unacceptable assets which were written off on the books of the bank, such recoveries to be applied, in the first instance, to the amounts subordinated by the petitioner.

24. At the end of each year from 1911 to 1921, inclusive, Prince [3] was indebted to the petitioner upon cash borrowed

[3] The name Prince is hereinafter sometimes used to include F. H. Prince & Co., the name under which he conducted his brokerage business.

from it. His indebtedness at the end of 1911 amounted to $300,000. This amount steadily increased up to 1921 when the amount was $760,000. The loans of cash and of securities by the petitioner to Prince at the end of each year from 1922 to 1933, inclusive, were as follows:

Year	Cash	Securities	
		Bonds Petitioner and United States Treasury	Stock New Jersey Co. common shares
1922	$ 760,000.00	$160,000	16,855
1923	785,000.00	160,500	16,855
1924	760,000.00	164,000	15,355
1925	760,000.00	172,000	15,365
1926	947,867.08	172,000	14,755
1927	1,600,000.00	150,000	11,000
1928	1,700,000.00	150,000	11,000
1929	3,104,400.00	150,000	6,000
1930	2,529,400.60	150,000	4,200
1931	2,619,400.00	241,000	3,400
1932	3,408,000.00	91,000	1,710
1933	4,848,000.00	41,000	1,800

From 1918 the petitioner was indebted to F. H. Prince & Co. for shares of common stock of the Jersey Co., and bonds of the petitioner acquired by it from F. H. Prince & Co. The amount owing at the end of 1918 was $3,433,694.35. The amount of the debt at the end of each year from 1922 to 1925, inclusive, was as follows:

1922	$717,001.28
1923	497,396.64
1924	269,352.26
1925	40,460.37

This indebtedness was entirely liquidated during the year 1926 and the petitioner was not thereafter indebted to either F. H. Prince or F. H. Prince & Co.

Prince's indebtedness to the petitioner and the petitioner's indebtedness to Prince have always been carried

in separate accounts. Upon the petitioner's debts to Prince it paid interest at the rate of 5 percent or more, depending upon the rate charged by E. H. Prince & Co. to other margin customers. Upon its loans to Prince the petitioner always collected interest at the rate of 4 percent per annum. Prince paid the petitioner nothing for the securities borrowed by him.

From 1912 to 1933, Prince pledged collateral with the petitioner for the cash loans advanced to him, which consisted principally of common stock of the petitioner. The fair market value of the collateral pledged at the end of each year was as follows:

1922	$397,700.00	1928	$3,620,626.00
1923	411,106.00	1929	4,786,332.50
1924	60,878.00	1930	3,673,608.00
1925	20,978.00	1931	3,769,684.25
1926	5,956.00	1932	5,541,695.20
1927	3,284,128.00	1933	8,664,199.00

The loans were used by Prince for any purpose desired by him. In 1932 the petitioner loaned Prince $160,000 for the purchase of a home in Newport, Rhode Island; also $450,000 in order to strengthen the financial statement of E. H. Prince & Co. which Prince was required to file with the New York Stock Exchange. In 1933 the petitioner loaned an additional amount of $440,000 to Prince for the same purpose and $1,000,000 to enable him to acquire shares of stock of Armour & Co. In 1933 Prince purchased Armour & Co. common A and B shares and preferred stock at a cost to him of $1,067,389.50. With this acquisition of stock of Armour & Co. Prince became chairman of the board of directors of Armour & Co.

25. The balance sheets of the petitioner for the years 1930 to 1933, inclusive, revised to reflect correct earned surplus, are as follows:

Assets	1930	1931	1932	1933
Cash	$9,628,450.77	$9,516,616.07	$7,779,716.27	$7,645,235.97
Accounts receivable	123,311.35	106,473.75	11,884.67	45,285.50
Notes receivable (District)	800,000.00	800,000.00	1,350,000.00	1,625,000.00
Other notes receivable	2,529,400.00	3,027,660.61	3,424,550.74	4,848,000.00
Interest and dividends receivable	57,377.16	66,408.20	81,053.68	77,769.25
Investments:				
New Jersey Co. common	11,036,509.99	11,136,385.49	11,193,549.19	11,241,352.19
New Jersey Co. preferred	64,935.00	124,844.25	150,823.28	218,933.33
District 5's	48,703.00	46,693.00	40,667.00	30,747.00
Produce Terminal	1,032,431.95	1,032,431.95	1,032,431.95	1,032,431.95
District capital stock	506,421.08	506,421.08	506,421.08	506,421.08
Other investments	1,410,771.11	2,774,885.99	1,443,966.14	1,333,989.27
Own 5% bonds in treasury	2,818,740.89	2,862,462.89	3,156,483.64	3,165,286.14
Own 7% bonds in treasury	372,000.00	186,000.00		
Notes receivable—Pau Corporation			189,503.34	236,536.51
Western associates stock				1,500,000.00
Notes receivable taken over			327,307.55	322,801.51
Subordinated deposits				1,800,000.00
Advances to banks			3,071,779.19	
Investment account	7,000,000.00	7,000,000.00	7,000,000.00	7,000,000.00
Total	37,429,052.30	39,187,284.28	40,760,137.72	42,629,789.70
Liabilities				
5% bonds of 1961	6,260,000.00	6,260,000.00	6,260,000.00	6,262,000.00
10 year 7% bonds	400,000.00	200,000.00		
Notes and accounts payable	109.81	109.65		23,786.00
Accrued bond interest	78,250.00	78,250.00	78,250.00	78,275.00
Capital stock	8,000,000.00	8,000,000.00	8,000,000.00	8,000,000.00
Surplus	22,684,242.49	24,642,474.63	26,415,437.72	28,259,278.70
Capital surplus	6,450.00	6,450.00	6,450.00	6,450.00
Total	37,429,052.30	39,187,284.28	40,760,137.72	42,629,789.70

26. The net income of the petitioner and the dividends paid by it in the years 1911 to 1933, were as follows:

Year	Net earnings	Dividends paid	Excess of net earnings
1911-1929	$24,375,905.69	$4,760,000	$19,615,905.69
1930	3,468,336.80	400,000	3,068,336.80
1931	2,358,232.14	400,000	1,958,232.14
1932	2,172,963.09	400,000	1,772,963.09
1933	2,243,840.98	400,000	1,843,840.98
	34,619,278.70	6,360,000	28,259,278.70

27. A comparison of petitioner's balance sheets at December 31, 1929, and December 31, 1933, as corrected by stipulations filed, shows as follows:

Assets	1929	1933	Increase or (decrease)
Cash	$6,689,304.26	$7,645,235.97	$955,931.71
Cash (subordinated deposits)		1,800,000.00	1,800,000.00
Notes receivable (District)		1,625,000.00	1,625,000.00
Notes receivable (F. H. Finco)	3,194,400.00	4,848,000.00	1,743,600.00
Notes receivable (Paa Corp.)		236,536.51	236,536.51
Accounts receivable	252,447.08	45,285.50	(207,161.58)
Interest and dividends receivable	71,038.07	77,769.25	6,731.18
Investment at cost:			
Jersey Co. common[1]	10,993,551.74	11,241,352.19	247,800.45
Jersey Co. preferred[2]	45,821.00	218,933.33	173,111.83

[1] For 1929—27,442 shares at cost, $4,733,551.74, and 31,300 shares for $6,260,000 5% bonds; for 1933—29,026 shares at cost, $4,979,352.19, and 31,310 shares for $6,262,000 5% bonds.

[2] For 1929 cost of 457 shares; for 1933 cost of 2,362 shares.

Assets	1929	1933	Increase or (decrease)
Investments at cost—Continued.			
District 6's of 1930	$27,000.00		($27,000.00)
District 5's	55,733.00	$30,747.00	(24,986.00)
Transit Co. 5½'s	15,022.50		(15,022.50)
Produce Terminal (capital stock)	1,032,431.95	1,032,431.95	
District Co. (capital stock)	506,448.00	506,421.08	(26.92)
Other investments	1,467,338.35	1,333,989.27	(133,349.08)
Own 5's of 1961	2,742,178.89	3,165,286.14	423,107.25
Own 7's	558,000.00		(558,000.00)
Western Associates, Inc. (capital stock)		1,500,000.00	1,500,000.00
Notes receivable (taken from bank)		322,801.51	322,801.51
Investment account	7,000,000.00	7,000,000.00	
Total	34,360,715.34	42,629,789.70	8,069,074.36
Liabilities			
5% bonds of 1961	$6,260,000.00	$6,262,000.00	$2,000.00
10-yr. 7% bonds	600,000.00		(600,000.00)
Notes and accounts payable	109.65	23,786.00	23,676.35
Accrued bond interest	78,250.00	78,275.00	25.00
Capital stock	8,000,000.00	8,000,000.00	
Surplus	19,615,905.69	28,259,278.70	8,643,373.01
Capital surplus	6,450.00	6,450.00	
Total	34,560,715.34	42,629,789.70	8,069,074.36

The net earnings of the petitioner for the four years 1930 to 1933 were $10,243,373.01. Of these earnings $1,600,000 was paid out in dividends, $8,069,074.36 is represented by an increase in assets, and $574,298.65 was used in reduction of liabilities.

In explanation of the above balance sheets it should be noted that the asset, "Investment Account" of $7,000,000,

has no asset value at the present time. It represents the $7,000,000 of capital stock which was issued for the plan turned over to the corporation shortly after its organization in 1911. It had no fair market value at the date of its acquisition.

It should further be noted that the asset "Own 5's, of 1961" in the amount of $2,742,178.89 for 1929 represents the cost to the petitioner of $3,033,000 of its own bonds and the asset "Own 7's" in the amount of $558,000 cancels a liability of $600,000. The petitioner had no outstanding 7 percent bonds in either 1929 or 1933. If these bonds were canceled instead of being carried as treasury bonds the surplus of the corporation at December 31, 1929, would be increased in the amount of $332,821.11. Likewise, the corresponding asset of $3,165,286.14 in the balance sheet for 1933 shows the cost to the petitioner of $3,642,000 par value of 5 percent bonds. If these bonds were canceled the petitioner's liability on 5 percent bonds of 1961 would be shown as $2,620,000 and its surplus at the end of 1933 increased in the amount of $476,713.86.

28. The consolidated net income of the petitioner and the Jersey Co. and their subsidiaries in the years 1930 to 1933 were as follows:

Net Income	1930		1931		1932		1933	
Transit Co.		$1,867,913.59		$1,607,169.30		$3,617,984.99		$(827,463.49)
Less dividends		10,000.00		8,000.00		8,000.00		2,000.00
		1,857,913.59		1,599,169.30		3,609,984.99		(829,463.49)
Harness & Saddlery Co.		5,771.21		3,659.48		(1,107.77)		4,290.16
Railway Co.		1,242,627.46		1,468,683.49		1,193,618.30		1,342,138.32
Elevated Co.		(25,758.14)		(25,758.14)		(25,758.14)		(25,758.14)
Produce Terminal		341,102.08		340,796.63		372,616.30		29,850.39
Jersey Co.	$2,481,647.14		$2,441,980.87		$2,406,220.02		$2,268,079.38	
Less dividends	3,081,857.96		3,085,651.35		3,080,872.44		2,903,500.00	
		(600,210.82)		(643,670.48)		(674,652.42)		(635,420.62)
District		289,403.32		119,660.31		207,492.82		237,932.62
Central Storage & Forwarding Corp.				(41,121.97)		(87,765.63)		(5,467.26)
Central Storage Corporation				11,686.78				
Pau Corp.						7,564.81		(486.45)
Petitioner	$3,468,336.80		$2,358,232.14		$2,172,963.09		$2,243,840.98	
Less dividends	2,178,897.68		2,184,985.96		2,196,664.10		2,185,460.44	
		789,466.04		173,246.18		(23,701.01)		58,380.54
Total		4,400,287.82		3,006,357.58		4,578,292.25		185,996.07

29. The income and deductions of the petitioner in the years 1930 to 1933, as shown on its income tax returns for these years, were as follows:

Income	1930	1931	1932	1933
Interest	$546,120.45	$570,987.68	$572,055.03	$462,252.74
Profit on sales	614,047.21	16,389.50	(100,791.54)	64,164.69
Dividends	2,217,331.68	2,225,316.50	2,216,260.35	2,197,212.52
Profit on real estate		967.30		
Total income	3,377,499.31	2,813,660.98	2,687,523.84	2,723,638.95
Deductions				
Salary president	50,000.00	50,000.00	50,000.00	50,000.00
Salary, treasurer	500.00	500.00	500.00	500.00
Interest	313,256.53	313,349.34	313,000.00	313,343.57
Taxes	425.00	425.00	212.12	48,167.70
Wages	2,000.00	2,000.00	2,000.00	2,000.00
Maintenance of trust	960.00	960.00	960.00	
Commissions	690.10	680.62	680.62	
Rent	315.00	420.00	420.00	352.00
Directors' fees	90.00	90.00	120.00	90.00
Auditors	5,276.92	4,392.97		
Legal expense			50.00	15,875.52
Postage, etc.	18.74	31.69	102.67	212.92
Traveling	12.00	12.14	12.44	
Bad debt	13,385.00			
Services of trustees				1,493.03
Corp. trust				100.00
Draft expense				4.49
Error on return	0.01			
Dividends	2,217,331.68	2,225,316.50	2,216,260.35	2,197,221.52
Total deductions	2,604,321.98	2,598,378.26	2,584,367.70	2,629,361.05
Net income	773,177.36	215,282.72	98,156.14	94,277.90

The net income of the Jersey Co., the dividends paid by it, and its earned surplus on December 31 in the years 1930 to 1933 were as follows:

Year	Net income	Total dividends	Dividends to others than petitioner	Earned surplus on Dec. 31
1930	$2,481,647.14	$2,421,857.96	$443,028.75	$5,062,663.22
1931	2,441,980.87	2,425,651.35	436,872.00	5,060,554.76
1932	2,406,220.02	2,420,872.44	428,987.25	5,027,464.36
1933	2,268,079.38	2,313,500.00	425,412.00	4,903,605.76

The net income of the Transit Co., the dividends paid by it, and its earned surplus on December 31 in the years 1930 to 1933 were as follows:

Year	Net income	Dividends	Earned surplus on Dec. 31
1930	$1,867,913.59	$1,844,357.96	$5,019,956.05
1931	1,607,169.30	1,848,151.35	4,778,974.00
1932	3,617,984.99	1,843,372.44	6,262,414.55
1933	(827,463.49)	1,716,000.00	3,718,951.06

Included in the net income for 1932 was a nonrecurrent item of $2,426,433.29, consisting of impounded reweighing charges, plus interest, accumulated since 1921. In 1933 a nonrecurrent item resulting from a charge-off of securities, including real estate bonds taken over from the Stock Yards Trust & Savings Bank, capital stock of the Stock Yards National Bank, and debenture bonds of the Stock Yards Investment Co. which Government examiners had ordered taken out of the Stock Yards National Bank, caused a decrease in income in the amount of $2,204,754.77.

The net income of the Railway Co., the dividends paid by it, and its earned surplus on December 31 in the years 1930 to 1933 were as follows:

Year	Net income	Dividends	Earned surplus on Dec. 31
1930	$1,242,627.46	$1,237,500.00	$2,073,581.72
1931	1,468,683.49	1,237,500.00	2,304,765.21
1932	1,193,618.30	1,237,500.00	2,260,885.51
1933	1,352,138.32	1,187,500.00	2,425,521.83

In each of the years 1930-1933 the Elevated Co. sustained a loss of $25,758.14 and on December 31 in the years 1930-1933 it had deficits as follows:

1930	$57,361.55
1931	83,119.65
1932	108,877.83
1933	134,635.97

The net income of Produce Terminal, the dividends paid by it, and its earned surplus on December 31 in the years 1930-1933 were as follows:

Year	Net income	Dividends	Earned surplus on Dec. 31
1930	$341,102.08	$200,000	$1,039,253.66
1931	340,796.63	200,000	1,180,050.29
1932	372,616.30	200,000	1,352,666.59
1933	29,850.39	200,000	1,182,516.98

The net income of the District and its earned surplus on December 31 in the years 1930-1933 were as follows:

Year	Net income	Earned surplus on Dec. 31
1930	$289,403.32	$5,126,553.50
1931	119,666.31	5,254,553.21
1932	207,492.82	5,462,046.03
1933	237,932.62	5,699,978.65

The District has never paid a dividend.

The Central Storage Corporation had income in the amount of $11,686.78 in 1931 and paid no dividends. The Central Storage & Forwarding Corporation paid no dividends and had losses in the years 1931-1933 as follows:

1931	$41,121.97
1932	87,765.63
1933	5,467.26

On December 31, 1931, the Central Storage Corporation had a surplus of $27,526.71. The earned surplus of the Central Storage & Forwarding Corporation on December 31 was $12,432.85 in 1931 and it had deficits of $113,928.04 and $119,395.30, respectively, on December 31, 1932, and December 31, 1933.

The net income of the Harness & Saddlery Co., the dividends paid by it, and its earned surplus on December 31 in the years 1930-1933 were as follows:

Year	Net income	Dividends	Earned surplus on Dec. 31
1930	$5,771.21	$10,000	$36,527.53
1931	3,659.48	8,000	32,187.01
1932	(1,107.77)	8,000	23,079.24
1933	4,290.16	2,000	25,369.40

Western Associates, Inc., received no income and had no expenses prior to December 31, 1933.

30. In the years 1923-1933 transactions in Jersey Co. 4 percent and 5 percent bonds took place on the Boston Stock Exchange as follows:

Year	5% bonds	4% bonds	Year	5% bonds	4% bonds
1923	$294,000	$80,000	1930	$168,000	$113,000
1924	374,000	119,000	1931	161,000	51,000
1925	320,000	109,000	1932	191,000	99,000
1926	290,000	133,000	1933	161,000	65,000
1927	138,000	33,000			
1928	95,000	28,000	Total	2,682,000	929,000
1929	490,000	99,000			

In the years 1926-1933 the Jersey Co. 4 percent and 5 percent bonds were offered for sale by brokers on the over-the-counter market, the high and low asked prices being as follows:

	4% bonds		5% bonds	
	High	Low	High	Low
1926 (last half)	91	90	101½	97¾
1927	93	90	102	100¼
1928	92½	92	103	98
1929	....	....	....	....
1930	95	90	103	100
1931	96	81⅜	104¼	90
1932	90	68	98	83
1933	93	85	101	93¼

The high and low actual market sales prices of the Jersey Co. 4 percent and 5 percent bonds in the years 1913-1933 were as follows:

	4% bonds		5% bonds	
	High	Low	High	Low
1913	86½	79	100⅜	98¼
1914	84	80	101⅛	99
1915	85	82	100⅛	100
1916	87	84	102	100½
1917	87	84¾	102½	91¼
1918	75	72½	93	87½
1919	77	71	94½	83½
1920	71	60	84½	74
1921	75¼	63	88¼	74
1922	84	74¾	97	89¾
1923	84	78½	95	88½
1924	84½	80	98½	92¾
1925	87	84	100	96
1926	90	86	102	99

1927	91	88½	102⅞	100½
1928	94½	89	104	100¾
1929	89	83	101⅞	94
1930	94⅛	86	102⅜	98½
1931	95¼	90	104	90
1932	90	75	98½	81
1933	93¾	82	101¼	90

In the years 1926-1933 the Elevated Co. bonds were offered for sale by brokers on the over-the-counter market, the high and low asked prices being as follows:

	High	Low		High	Low
1926 (last half)	85½	83½	1930	83	78½
1927	89½	84½	1931	85	73
1928	89½	82½	1932	80	62
1929	....	....	1933	75	67½

31. During the years 1930-1933 there grew up among the packers a practice of buying livestock directly from the farmers in the country, shipping to smaller stockyards and conveying it by truck to the packing houses, thereby avoiding the Chicago stockyards entirely. Packing houses had also been built in Iowa and southern Minnesota, causing a shrinkage in the revenue of the Chicago stockyards in the years 1930-1933. In 1932-1933 Prince, with the funds in the form of notes furnished by the petitioner, purchased $1,000,000 of stock in Armour & Co., sufficient to enable him to become chairman of the board of directors of that company and retain its business for the Chicago stockyards.

32. During the years 1930-1933 the petitioner had substantial sums on deposit in banks, receiving interest at the rate of 3 percent for the first six months in 1930, 2½ percent for the last six months in 1930 and for the first six months in 1931, 2 percent for the last six months in 1931 and for the year 1932, and 1½ percent for the first six

months of 1933, when interest payments on ordinary commercial deposits stopped.

In the years 1930-1933 the petitioner loaned to the District amounts as follows: 1930, $800,000 to meet the District's maturing bonds; 1932, $275,000 to meet bonds maturing in that year and $275,000 to assist in the erection of a building upon land sold by the District; 1933, $275,000 to meet maturing bonds. The petitioner loaned to the Pau Corporation, for the purpose of purchasing machinery installed in the plant of Produce Terminal, $189,503.34 in 1932 and $47,033.17 in 1933, no interest being paid to the petitioner on such loans.

33. The petitioner acquired Jersey Co. common stock continually from 1911 through 1933. On December 31, 1929, it had acquired 58,742 of the 65,000 shares outstanding, and on December 31, 1933, it had acquired 60,336 shares. Of the 60,336 shares, 31,310 were acquired in exchange for $6,262,000 par value of the petitioner's bonds and 29,026 for $4,979,352.19 cash. In the years 1929-1933 the petitioner acquired 2,362 shares of Jersey Co. preferred stock at a total cost of $218,933.33; it had made no purchases of such stock prior to 1929. In 1918 the petitioner paid F. H. Prince & Co. $3,190,339.96 for 17,929 shares of Jersey Co. common stock, which the latter had acquired in the years 1911-1918, and $243,354.39 for $286,000 face value of petitioner's 5 percent bonds. In 1922 the petitioner began to pay cash for its purchases of Jersey Co. stock. During the years 1930-1933 the petitioner purchased Jersey Co. common and preferred and its own 5 percent bonds in amounts and at costs as follows:

Year	Security	Cost
1930	253 shares Jersey Co. common	$42,958.25
	190 shares Jersey Co. preferred	19,113.50
	Petitioner's 5% bonds, $90,000	76,562.00
	Total	138,633.75

1931	604 shares Jersey Co. common	$99,875.50
	616 shares Jersey Co. preferred	59,909.25
	Petitioner's 5% bonds, $57,500	43,722.00
	Total	203,506.75
1932	380 shares Jersey Co. common	$57,163.70
	302 shares Jersey Co. preferred	25,979.03
	Petitioner's 5% bonds, $447,500	294,020.75
	Total	377,163.48
1933	357 Jersey Co. common	$45,803.00
	797 shares Jersey Co. preferred	68,110.05
	Petitioner's 5% bonds, $14,000	8,802.50
	Total	122,715.55

In 1933 the petitioner also issued $2,000 face value of its 5 percent bonds for 10 shares of Jersey Co. common.

34. In the years 1931-1933 F. H. Prince & Co. sold securities to the petitioner, and Prince on his income tax returns for these years took and was allowed by the Commissioner deductions for losses on such sales, the selling price, cost, and losses being as follows:

Year	Selling price	Cost	Loss
1931			
$150,000 Amoskeag Mfg. Co. 6's	$84,000.00	$141,299.55	$57,299.55
$10,000 Chi. Mil. & St. Paul R. R. 5's	1,155.00	10,600.00	9,445.00
1,500 shares Western Dairies	4,140.00	16,422.84	12,282.84
846 shares Tidewater Asso. Oil	2,229.21	20,900.00	18,670.79
1,000 shares Hoosac Mills 7% pfd	22,819.00	100,000.00	77,189.00
10,000 shares Armour & Co., "B"	5,850.00	27,087.50	21,237.50
Total			196,124.68

1932				
$141,400	Amoskeag Mfg. Co.	56,148.94	133,198.36	$77,049.42
884	shares Soo Leased lines	3,402.40	46,205.64	42,803.24
3,000	shares First Natl. Bk Boston	78,557.00	180,333.42	101,776.42
	Total			221,629.08
1933				
2,486	shares First Natl. Bk. Boston	58,664.00	152,766.22	$93,102.22

No securities were sold by F. H. Prince & Co. to the petitioner in 1930. In 1932 the petitioner sold to F. H. Prince & Co., Inc., 3,050 shares of the Stock Yards National Bank and 240 shares of the Central Manufacturing District Bank at a loss to the petitioner of $221,202.03.

35. In each of the years 1930-1933 Prince held offices and received annual salaries as follows:

President of the Jersey Co.	$17,500.00
Chairman of the board of directors of the Transit Co.	17,500.08
Chairman of the board of directors of the Railway Co.	12,499.92
President of the petitioner	50,000.00

Until his death in 1926, J. A. Spoor was president of the Transit Co. and in complete control of the Transit Co., Railway Co., and Elevated Co. He sent reports to F. H. Prince & Co. in Boston. After Spoor's death Prince became chairman of the board of directors of the Transit Co. and representatives of the petitioner went to Chicago with increasing frequency, giving orders and directions. There was daily contact by telephone between the men operating the companies in Chicago and the officers of the petitioner. Prince handled the stockyards banking situation from 1930 to 1933. Ultimate choice as to officers, directors, and other personnel was dictated by Prince and

he decided dividend policies. He also gave instructions as to the banks in which funds were to be deposited and his authority was necessary for unusual expenditures by the Transit Co. After the destruction of part of the stockyards by fire, the president and vice president of the petitioner went to Chicago and gave orders as to what buildings should be rebuilt and how. The yards were not entirely restored. The restoration was paid for with insurance funds received by the Transit Co. In certain instances suggestions of the officers in Chicago were rejected by Prince. In 1933 Prince refused to permit the Transit Co. to spend enough money to build fireproof hog and sheep houses requested by the men in Chicago. Prince granted permission to rebuild the amphitheatre in which the International Live Stock Exposition was held.

36. Produce Terminal, the Transit Co., the District, and the Railway Co. sent to the petitioner monthly reports showing a summary of operations, which, except for the District's report, were copies of reports required by the Illinoi. Commerce Commission, the form of reports by the Transit Co. having been devised by its auditors. The petitioner assisted the District on many occasions in financing the construction of buildings. In 1932 it furnished between $300,000 and $400,000 for one building.

When the South Side Elevated Co., operating the Elevated Co. properties, went into receivership in 1932 the Jersey Co., as guarantor, paid the rental, which was used to pay the interest on the Elevated Co. bonds.

37. During the years 1930-1933 the individual income and surtaxes assessed against and paid by Prince were as follows:

1930	$51,570.96
1931	26,061.08
1932	20,023.94
1933	10,164.29

If the petitioner had distributed its annual profits for each of the years 1930, 1932, and 1933 the surtax liability of F. H. Prince would have been increased as follows:

1930	$572,234.91
1932	36,582.33
1933	377,706.61

38. It is stipulated that the petitioner is entitled for 1933 to a deduction not claimed on its return of $24,000 paid as an assessment made by the banking authorities of the State of Illinois against 240 shares of the Central Manufacturing District Bank owned by the petitioner.

39. The stockholders of the petitioner did not report any of the undistributed earnings of that company in the years 1930, 1932, and 1933 under the provisions of section 104 (d) of the Revenue Acts of 1928 and 1932.

40. Under the contract of October 1, 1914, wherein the petitioner guaranteed certain dividends and expenses of the Jersey Co., it was never called upon to make any payments pursuant to said guaranty, such expenses and dividends having been paid directly by the Jersey Co., after which the Jersey Co. was able to and did make large annual distributions of its earnings to the petitioner.

41. During the years 1930 to 1933, inclusive, and prior thereto the principal activity of the petitioner was the purchase and holding of securities and the collecting of dividends thereon, together with the lending of money to F. H. Prince. The majority of the securities so purchased were acquired by the petitioner directly from F. H. Prince or through the brokerage house owned by him which he conducted under the trade name of F. H. Prince & Co., upon which regular brokerage fees were paid by the petitioner.

42. At no time did the petitioner purchase any of the outstanding bonds of the Jersey Co. or the Elevated Co.

43. In its income tax returns for the years 1930 to 1933,

inclusive, the petitioner has described its business as that of "acquiring and guaranteeing securities."

44. During the years 1930, 1932, and 1933 the petitioner was a mere holding or investment company.

45. During the years 1930, 1932, and 1933 the petitioner permitted its gains and profits to accumulate beyond the reasonable needs of its business.

46. During the years 1930, 1932, and 1933 the petitioner was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

OPINION.

SMITH: The only issue for decision in this case is whether in 1930, 1932, and 1933 the petitioner was taxable under section 104 of the Revenue Acts of 1928 and 1932, that section being identical in both revenue acts.

Section 104 (a) subjects any corporation to a tax equal to 50 percent of its net income, in addition to the tax imposed by section 13, if it "is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed." Subdivision (b) provides that "the fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax." Subdivision (d) provides that "the tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year."

In his deficiency notice the respondent held that the petitioner was liable to the tax under section 104, saying:

After a careful consideration of your Federal income tax returns, the protests mentioned above, and all other available information, the Bureau holds that your corporation is subject to taxation under section 104 of the Revenue Acts of 1928 and 1932.

The petitioner in its brief calls attention to the fact that the respondent in his deficiency notice has not determined that the petitioner was either formed or availed of for the interdicted purpose, implying thereby that the Government's case would be stronger if he had made such a categorical determination in his deficiency notice.

We do not think that this is true. The respondent has determined, and has stated in his deficiency notice, that the petitioner is "subject to taxation under section 104 of the Revenue Acts of 1928 and 1929." The only possible factual basis upon which such a determination could rest is that the petitioner was either "formed" or "availed of" or that it was both formed and availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed. The necessary implication, we think, carries all the force of a specific determination that such were the facts. The petitioner apparently so understood, for it has adduced a mass of evidence directed towards disproval of those very facts.

In *C. H. Spitzner & Son, Inc.*, 37 B. T. A. 511, and *Mellbank Corporation*, 38 B. T. A. 1108, the respondent sent deficiency notices stating that the taxpayers were "subject to taxation under the provisions of section 104 of the Revenue Act of 1932," without stating or indicating whether such determination was based upon the premise that the taxpayers were "formed" or "availed of" for the prohibited purpose, or that the taxpayers were mere holding or investment com-

panies or that their gains and profits had been permitted to accumulate beyond the reasonable needs of the business. Nevertheless, we proceeded to determine the issue raised in the light of the evidence bearing upon the various factors essential to the respondent's determinations.

We think that the respondent's determination that the petitioner here is subject to tax under section 104 places the burden squarely upon the petitioner of proving that it was neither formed nor availed of for the interdicted purpose.

The petitioner makes the further contention that section 104 of the Revenue Acts of 1928 and 1932 is unconstitutional. This point must be decided against the petitioner's contention, in accordance with *Helvering* v. *National Grocery Co.*, 304 U. S. 282; rehearing denied, 305 U. S. 669.

The petitioner was formed in 1911. It clearly was not formed for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed, and the respondent does not so contend.

There remains for consideration only the question whether the petitioner was "availed of" during the taxable years for the interdicted purpose. The petitioner contends that it was not. The question must be answered in the light of all of the evidence. If the evidence establishes the fact either that the petitioner was a "mere holding or investment company" or that the gains or profits have been "permitted to accumulate beyond the reasonable needs of the business," a prima facie presumption arises of a purpose on the part of the stockholders to escape the surtax.

We consider first the question whether the evidence establishes the fact that the petitioner is a "mere holding or

investment company." Petitioner admits that it is a holding company, but denies that it is a "mere" holding or investment company. It submits that it supervises and directs the policies and business operations, other than the daily routine, of all the companies constituting the stockyards enterprise, and acts as banker for them. It further submits that a "mere holding or investment company" is one that holds securities, collects, and possibly invests and reinvests income therefrom, and does nothing more. We think that this definition overemphasizes the importance of the word "mere" in the phrase above quoted. It was apparently the intention of Congress in using the phrase to differentiate a holding or investment company actively engaged in a trade or business from one which has income only from interest and dividends and profits from the sale of securities, and limits its activities to those incident to an ordinary holding or investment company. Cf. *C. H. Spitzner & Son, Inc., supra.*

In *Rands, Inc.*, 34 B. T. A. 1094, the Board said:

> . . . The term "holding company" does not exclude one which actively deals with the funds contributed by its principal and almost sole shareholder, instead of being a passive repository or "holder" of the funds or assets. Cf. *Keck Investment Co. v. Commissioner, supra, R. & L., Inc. v. Commissioner, supra.* An investment company is not to be defined as one restricted to long term investments for regular income and excluding one which trades in the market and buys and sells speculative stocks or real estate. . . .

In *Reynard Corporation*, 37 B. T. A. 552, the facts were that an individual engaged in the creation of cartoons, whose income therefrom was $1,500 to $2,000 a week, caused a corporation to be organized, to which he transferred the greater part of his property for its capital stock. He became its president and contracted with the corporation to work for it at a salary of $2,500 a month. The corpora-

tion, through him as president, entered into a contract for three years with a syndicate for a guaranteed minimum payment of $1,500 a week for the use of cartoons to be created by the president during the three-year period. The activity of the corporation was that of entering into a contract pursuant to which it had a definite and fixed obligation. The Board held, nevertheless, that it was a "mere holding or investment company."

In *R. & L., Inc.*, 33 B. T. A. 857; affd. (C. C. A., 5th Cir.), 84 Fed. (2d) 721; certiorari denied, 299 U. S. 588, the taxpayer contended that it was an operating company, engaged in the management of its properties, conducting a film booking business, and managing a chain of suburban motion picture theaters. We held that it was a "mere personal holding or investment company."

In *Almours Securities, Inc.*, 35 B. T. A. 61; affd., 91 Fed. (2d) 427; certiorari denied, 302 U. S. 765, the taxpayer invested a portion of its large income in real estate and in the acquisition of shares of stock of a number of banks and of other corporations whose operations it actively supervised, and also operated a concession at Mt. Vernon, Virginia. We held that those activities were inconsequential when the size of the corporation was taken into consideration. Without finding that the corporation was a "mere holding or investment company," we said: "The evidence conclusively shows that the petitioner was primarily a 'holding or investment company.'" In affirming our decision in that case the Circuit Court of Appeals said:

> Petitioner's operations were conducted largely through subsidiaries, which were looked after by Mr. du Pont and his brother-in-law, Mr. Ball. After a portion of its cash net earnings was distributed, the remainder was permitted to accumulate beyond the reasonable needs of its business, and reinvested, thereby saving a large amount of income tax which the stockholder would have been obliged to pay for the years in controversy.

In all of its income tax returns for the years 1930 to 1933, inclusive, the petitioner described its business as that of "acquiring and guaranteeing securities." So far as the evidence shows the petitioner guaranteed no securities after the execution of its agreement of October 1, 1914. Since under that agreement it was to receive all of the earnings of the Jersey Co. and its subsidiaries, after the payment of interest and expenses, it guaranteed the payment by the Jersey Co. of interest on the bonds of the Jersey Co. and its subsidiaries, and of dividends of 9 percent upon the stamped certificates of common stock of the Jersey Co. and of 6 percent upon the preferred shares of that company. It did not, however, guarantee the payment of the principal of the bonds above referred to. They were fully secured. The petitioner has never been required to pay out a dollar under its guaranty. During the tax years before us the petitioner collected its income, sold certain securities, made loans to Prince and to the Pau Corporation, wholly owned by Prince, and to the District, and purchased shares of stocks and bonds.

The petitioner's income during the years 1930 to 1933 consisted exclusively of interest, dividends, and profits from the sale of securities. It received no fees for the management and supervision of other corporations. Its office was Prince's office at 1 Court Street, Boston, Massachusetts. An inspection of its income tax returns shows that it had practically no office expenses. It paid no rent except vault rent. It paid its president a salary of $50,000 per annum, its treasurer a salary of $500 per annum, and "wages" of $2,000 per annum. It paid no other salaries or wages. McDonough was Prince's secretary and was also vice president of the petitioner. He did not, however, receive any salary from the petitioner.

On brief the petitioner submits:

We do not see how the fact that a company had small expenditures is of any real materiality in determining whether or not it is a mere holding company when the only functions claimed for it to bring it out of the category of "mere" is that it supervises and directs the policies and business operation, other than daily routine, of other companies, and finances these companies, acting as sort of a bank for the enterprise. These are functions which require more brain than brawn, so to speak, and do not require any physical expenditure of funds. No large office or office force is needed. As was testified to, the work consisted of mental operations on the part of Mr. Prince and his assistant, Mr. McDonough. . . .

It is true, of course, that Prince supervised the operations of the Jersey Co. and all of its subsidiaries as well as of the subsidiaries of the petitioner. He was enabled to do this through ownership of all the stock of the petitioner, which had virtual control through stock ownership of the other corporations. He was president of the Jersey Co., from which he received an annual salary of $17,500. He was also chairman of the board of directors of the Transit Co., from which he received a like salary, and chairman of the board of directors of the Railway Co., from which he received a salary of $12,499.92. He dictated the policies of the petitioner and of all of the other companies. It does not appear, however, that the petitioner supervised and managed the operations of its subsidiaries and those of the Jersey Co. and its subsidiaries. Prince did this himself. So far as appears, there were no meetings of the board of directors of the petitioner for the determination of any acts to be done by any of the companies. The returns of the Transit Co. and the Railway Co. report Prince as devoting 58 percent of his time to the affairs of the former and 42 percent to the latter. When directing the affairs of those companies Prince was acting as a paid employee of those companies and not of the petitioner.

A corporation which is a mere holding or investment company is subject to the tax imposed by section 104 (a) in the absence of a showing that it was not availed of for the interdicted purpose or that the stockholders included in their individual returns the company's earnings in accordance with section 104 (d). The evidence shows that the stockholders of the petitioner did not return the undistributed earnings and we think that it fails to show that the corporation was not availed of to prevent the imposition of the surtax upon its stockholders.

Section 104 was not leveled solely against holding and investment companies. Any corporation which permits its gains or profits to accumulate beyond the reasonable needs of the business is presumably availed of for the condemned purpose. We next consider the evidence bearing on the accumulation of gains or profits beyond the reasonable needs of the business.

Up to December 31, 1929, the petitioner had accumulated an earned surplus of $19,615,905.69. It had outstanding 5 percent bonds maturing in 1961 of a par value of $3,227,000. It had on hand cash in the amount of $6,689,304.26. It had notes receivable from F. H. Prince, its sole stockholder, in the amount of $3,104,400. Its principal investments consisted of Jersey Co. common shares, $10,993,551.74; Jersey Co. preferred shares, $45,821.50; and other investments at cost, some of which were not related to the Chicago stockyards enterprise, of $1,467,338.35. The character of some of these investments is shown by an analysis of petitioner's dividend receipts for 1929 as follows:

Chicago Junct. Rys. & Union Stock Yards Co.	$200,000.00
Chicago Junct. Rys & Union Stock Yards Co. common	247,272.75
Union Stock Yards & Transit Co.	420,702.00
Union Stock Yards & Transit Co. investment account	128,521.74

Chicago Junction Railway Co.	1,427,500.00
Produce Terminal Co.	200,000.00
Old Colony Trust Associates	2,000.00
Stock Yards National Bank	9,760.00
First National Bank of Chicago	2,413.00
U. S. Cold Storage common	4,333.50
U. S. Cold Storage preferred	1,750.00
Central Mfg. District Bank	4,000.00
Midland Warehouse common	2,796.00
National Shawmut Bank	350.25
Westland Oil	340.00
	2,651,739.24

During the four years 1930 to 1933 the petitioner had a net income of $10,243,373.01. During the same period it paid out in dividends $1,600,000; reduced its liabilities in the amount of $574,298.65; added to its cash on hand $2,755,931.71, $1,800,000 of which was subordinated to the claims of other depositors in a Chicago bank; loaned to the District (Central Manufacturing District), a common law trust beneficially owned by the Jersey Co., $1,625,000 to enable it to pay off some of its bonds and to make improvements to its properties; increased its loans to Prince in the amount of $1,743,600; loaned $236,536.51 to the Pau Corporation (wholly owned by Prince) upon which no interest was ever received; and spent $1,500,000 in the acquisition of shares of stock of Western Associates, Inc., $245,800.45 for 1,584 shares of common stock and $173,111.83 for 1,905 shares of preferred stock of the Jersey Co., $423,107.25 in the purchase of $609,000 par value of its 5 percent bonds of 1961, and various amounts in the purchase of other securities.

As a holding company, the petitioner had no need for the accumulation of gains and profits. In the ordinary holding or investment company the excess of income over expenses is either paid out in dividends or invested in additional income-producing assets. That is the use which

the petitioner made of its excess income. That use can not be regarded within the reasonable needs of the busines.

The petitioner contends, however, that it was more than a holding or investment company—that it was engaged in the business of managing the Chicago stockyards enterprise through subsidiary companies in which it owned an interest and that it was necessary for it to finance those companies. It claims that for that purpose it had need of a large surplus.

But even as a management company, we can not see that the petitioner had need for the accumulation of a large surplus. The only expense connected with the management were the payment of salaries and wages in the amount of $52,500 per year, and the annual income amply provided that revenue.

We do not see either that the petitioner had any need of an accumulation of gains and profits for the purpose of financing other corporations. It was not obligated on the principal of any bonds other than its own which were outstanding at December 31, 1929, in the amount of $3,227,000. It had guaranteed the interest, on the bonds of the Jersey Co. and its subsidiaries and dividends on the Jersey Co. common and preferred shares outstanding. But the evidence is to the effect that the petitioner had never been required to pay out a dollar under its guaranty. If it might be assumed that the petitioner needed some accumulation of gains and profits to provide for its guaranty, it should be noted that upon a paid-in capital of $1,000,000 it had accumulated gains and profits up to December 31, 1929, of almost $20,000,000. Certainly there is no indication of the need for any further accumulation in the years 1930, 1932, and 1933.

The evidence shows the manner in which the petitioner has used its earnings from the date of incorporation. It

has been free to use them in any manner it saw fit. It has used a large part of them in the purchase of shares of stock of the Jersey Co. The next most important item is loans made to Prince. During the years 1930 to 1933 the petitioner loaned $1,625,000 to District and $236,536.51 to the Pau Corporation. It had no financial interest in the latter. The necessity for these loans, if any existed, is not shown.

It is the claim of the petitioner that Prince, its principal stockholder, and during most of the years its sole stockholder, contemplated the liquidation of the Jersey Co. upon the expiration of its charter on June 10, 1940; that for such purpose Prince desired to acquire as many shares of Jersey Co. common stock as he could purchase at a reasonable price before 1940; that he was not so much interested in the purchase of preferred stock because that could all be acquired at par upon the liquidation of the Jersey Co. in 1940; that he also desired to accumulate in the treasury of the petitioner sufficient assets to pay off all the bonds of the petitioner and of the Jersey Co. and its subsidiaries by 1940.

The plan as at the close of the year 1929 contemplated an accumulation of cash and liquid assets in the treasury of the petitioner, its subsidiary, Produce Terminal, and the Jersey Co. and its subsidiaries of approximately $36,000,000, divided as follows:

Total bonded indebtedness	$23,963,000.00
Preferred stock Jersey Co. (64,543 shares)	6,454,300.00
Common stock Jersey Co. (6,258 shares)	1,034,134.50
Working capital	5,000,000.00
Total	36,451,434.50

The bonds and debenture notes of the petitioner and the Jersey Co. and its subsidiaries outstanding on December 31, 1929, were as follows:

Petitioner	
5% bonds maturing 1961	$ 3,227,000
Jersey Co.	
5% bonds maturing April 1, 1940	10,000,000
4% bonds maturing April 1, 1940	4,000.00
Transit Co.	
Debenture notes maturing 1930	500,000
Elevated Co.	
4% bonds maturing March 1, 1945	2,327,000
District maturing various dates to 1941	3,909,000
Total	23,963,000

We do not think that an accumulation of surplus for the purposes above indicated was within the reasonable needs of the petitioner's business. As above indicated, the petitioner was obligated to pay off only $3,227,000 of the $23,963,000 bonds outstanding at the end of 1929. It had on hand more than twice as much cash as was necessary to redeem those bonds and they did not become due until 1961.

Clearly, there was no reasonable need for the petitioner to acquire the balance of the common stock and the outstanding preferred shares of the Jersey Co. Amounts spent in the acquisition of those shares simply represented investments by the petitioner. The same also is true of any amounts that it might expend in acquiring the bonds of the Jersey Co. and its subsidiaries.

The bonds of the Jersey Co. and of its subsidiaries were well secured by deposit of collateral. The Jersey Co. had $14,000,000 of bonds outstanding since about 1890. In 1915 $10,000,000 of its bonds matured and were refunded without any assistance from the petitioner. The evidence shows that the real estate of the District has increased greatly in value since purchased. The earnings of the Jersey Co. have likewise increased greatly and that company is assured of the receipt of $2,000,000 annual rental of the Belt

Line railway. This lease does not terminate until 2021. Prince testified to the great value of this lease to the New York Central and that he had nothing to fear from a receivership of that company, since the lease was desired by other railroads.

The bonds of the Elevated Co. outstanding in the amount of $2,327,000 appear not to be well secured except through the guaranty by the Jersey Co. But the Jersey Co. is amply able to take care of both its own bonded indebtedness, and that of the Elevated Co.

The petitioner submits that on December 31, 1929, all of the companies constituting what it regards as the Chicago stockyards enterprise had cash and assets readily convertible into cash, without selling any of the shares of stock of the companies of the enterprise of a value of $19,691,666.52. However, that does not take into account the fixed assets of the companies representing the investment in the stockyards, in the railroad, and in other properties. Those assets are income-producing assets of great value. The net consolidated assets of the Jersey Co. and its subsidiaries, as shown by its consolidated return at December 31, 1929, was approximately $40,000,000 in excess of all liabilities and the evidence is to the effect that the book values of some of the assets are much less than their real value. For instance, the book value of $2,500,000 Indiana Harbor Belt Railroad Co. bonds maturing in 1935 and bearing 4 percent interest and guaranteed principal and interest by the Lake Shore & Michigan Southern Railway Co. and the Michigan Central Railroad Co., is only $50,000.

Under his program Prince, through the instrumentality of the petitioner, would own in 1940 all of the assets of the Jersey Co. and its subsidiaries, of a value of more than $60,000,000, free of debt.

In *Keck Investment Co.*, 29 B. T. A. 143; affd. (C. C. A.,

9th Cir.), 77 Fed. (2d) 244; certiorari denied, 296 U. S. 633; the taxpayer contended "that it was necessary for it to finance the Superior Oil Co., which had little bank credit, and that if it had not financed that company its investment in it would have been lost by forfeiture of leases." In our opinion we stated that we were not impressed by this argument; that "The business of the Superior Oil Co., was not the business of this company."

In the proceeding at bar we do not think that the evidence shows a reasonable need of the petitioner for any further accumulation of gains and profits during any of the years 1930, 1932, and 1933.

We have found on the evidence before us (1) that the petitioner is a "mere holding or investment company", and (2) that its gains or profits have been permitted to "accumulate beyond the reasonable needs of the business." The existence of these facts raises the statutory presumption that the corporation was "availed of" for the interdicted purposes, and we think that the evidence has not overcome the presumption.

Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932.

It should be borne in mind that the petitioner was solely owned by Prince from 1922 to June 1, 1932, and, for all

practicable purposes, thereafter. The petitioner was the *alter ego* of Prince. It was Prince in corporate clothes. It was of no moment to Prince whether the earnings of the petitioner were carried in his individual pocketbook or in his corporate pocketbook, except that if they had been received in the first instance in his individual pocketbook or distributed to him by the petitioner he would have been subjected to heavy surtaxes upon them, while he avoided such surtaxes by retaining them in the corporation. The situation is analogous to that which obtained in *Helvering v. National Grocery Co., supra,* where an operating company organized in 1908 had accumulated a surplus of approximately $8,000,000 and had cash and securities on hand aggregating approximately $4,250,000, which represented four-fifths of the total accumulation of surplus profits during the last ten years. The Supreme Court said:

> Since Kohl was the sole owner of the corporation, the business would have been as well protected against unexpected demands for capital, and assured of capital for the purpose of any possible expansion, by his personal ownership of the securities as by the corporation's owning them. . . .

The petitioner was the means by which Prince had succeeded in accumulating up to 1929 a personal fortune of between $15,000,000 and $20,000,000 practically immune from taxation; for the income of the petitioner consisted almost exclusively of dividends received from domestic corporations which were a legal deduction from its own gross income. The result was that the petitioner had in many years no taxable income, and in other years only a small taxable income.

The evidence shows that the petitioner was availed of by Prince for the purpose of reducing his own tax liabilities. Over a number of years Prince had accumulated more than 17,000 shares of Jersey Co. common stock upon which he

was receiving an annual dividend of $9 per share. These were his own shares of stock. The dividends on them were taxable to him. In 1918 he transferred all of those shares of stock to the petitioner at cost and was thereafter relieved from the payment of surtax upon the dividends thereon.

Prince started borrowing money from the petitioner in 1911. The amount of his borrowings increased irregularly from year to year. He was indebted to the corporation at December 31, 1929, in the amount of $3,104,000 and at the end of 1933 in the amount of $4,848,000. The amount of the debt increased in subsequent years. The borrowed funds were used for various purposes. It is true that he paid interest to the petitioner of 4 percent upon the money borrowed, the payment of which interest was deducted from his gross income in his individual tax returns. He also borrowed securities of large value from the petitioner, which he used as collateral to obtain loans at banks.

There is no satisfactory explanation of why the petitioner did not make a dividend distribution to Prince of the funds which he needed.

In the case of *Helvering* v. *National Grocery Co., supra,* the Supreme Court said:

> . . . As was stated in *United Business Corporation* v. *Commissioner, supra,* 62 F. 2d page 755: "These loans are incompatible with a purpose to strengthen the financial position of the petitioner, but entirely accord with a desire to get the equivalent of his dividends under another guise."

To the same effect see *William C. deMille Productions, Inc.,* 30 B. T. A. 826, and *Mead Corporation,* 38 B. T. A. 687.

It furthermore appears that in 1931, 1932, and 1933 Prince sold securities to the petitioner for $120,193.21, $138,108.35, and $59,664, respectively, which enabled him to deduct from gross income in his income tax returns for those years losses of $196,124.68, $221,629.08, and $93,102.22, re-

spectively, and in 1932 the petitioner sold to F. H. Prince & Co., Inc., which was organized by Prince on June 1, 1932, shares of the capital stock of the Stock Yards National Bank and of the Central Manufacturing District Bank, which enabled the petitioner to claim a deductible loss of $221,202.03. The shifting of these securities from Prince to the petitioner and from the petitioner to Prince really meant no economic loss to Prince and the investment by the corporation of the amounts of money spent in acquiring the securities from Prince was not in furtherance of the program which Prince claims to have had for the corporation.

It is agreed that if all of the net income of the petitioner for the taxable years 1930, 1932, and 1933 had been paid out as dividends the additional surtaxes payable by Prince would have amounted to $572,234.91 for 1930; $386,582.23 for 1932; and $377,706.61 for 1933, or a total for the three years of $1,336,523.85. This does not take into account any tax liabilities which might have been incurred by the other stockholder after January 1, 1932, or the tax which would have been payable by the F. H. Prince Trust if it had received and passed on the dividends. By the failure of the petitioner to distribute its profits during the three years before us Prince has avoided the payment of surtaxes in the amount of at least $1,336,523.85.

Section 104 (d) of the Revenue Acts of 1928 and 1932 provides a means by which a holding or investment company which accumulates its gains or profits beyond the reasonable needs of the business may avoid the payment of the tax imposed by section 104 (a). Subdivision (d) provides that the tax shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year. It has been stipulated in this proceeding that the

stockholders of the petitioner did not so report the earnings of the petitioner during the years before us.

Although Prince testified that under his program it was contemplated that the Jersey Co. would be liquidated in 1940, there appears to be no necessity for its liquidation and many reasons why it probably will not be liquidated. When the petitioner was organized in 1911, an issue of $14,000,000 bonds was provided for. The petitioner covenanted with the trustee that it would do all that was necessary for it to do to continue the existence of the Jersey Co. The outstanding bonds of the petitioner are callable at 105, but if they are not called and paid off the petitioner is under obligation to continue the existence of the Jersey Co.

McDonough, petitioner's vice president, testified that either he or Prince had consulted counsel as to the possibility of obtaining an extension or renewal of the Jersey Co.'s charter. Counsel advised that such an extension or renewal could undoubtedly be obtained under the New Jersey statutes. They simply require a consent of two-thirds of each class of stock of the old corporation. It is inconceivable that the petitioner can not obtain such a consent. It owns more than two-thirds of the common shares, and the preferred shares bearing a 6 percent dividend are well secured by assets and earnings.

Upon a liquidation of the Jersey Co. in 1940 the petitioner would apparently be subject to heavy income taxes; for its investment in the common and preferred shares and in the bonds of the Jersey Co. and its subsidiaries would amount to not more than $35,000,000 and the assets acquired would apparently have a value, based upon cost, book values, and earnings, of more than $60,000,000. Although

it may be desirable to merge or consolidate the petitioner and the Jersey Co., it seems doubtful whether the Jersey Co. will be liquidated in 1940.

In its brief petitioner calls attention to our opinion in *Mellbank Corporation, supra.* It states that its situation is in no great respect different from the situation which existed in that case and that, since we reached a conclusion that the taxpayer was not subject to tax under section 104, the same conclusion is warranted here.

Each case involving the application of section 104 must be decided upon its own facts. In the *Mellbank* case the Board said in its opinion:

> . . . Obviously, petitioner was not a mere holding or investment company. It had no investments in, and was not holding any corporate stocks, other than stocks of its member banks, which was necessary to enable it to carry on its business of managing, supervising, and operating those banks. . . .

The only year before us was 1932. The taxpayer had no taxable income for that year, after the deduction of dividends received upon certain shares of stock. Its net accumulation of gains and profits for the taxable year was only $98,444.32. We held upon the evidence as a whole that the corporation had not been availed of for the interdicted purpose stated in section 104 of the Revenue Act of 1932.

In our opinion the evidence in the proceeding at bar establishes that the petitioner is a mere holding or investment company; that its gains and profits were permitted to accumulate beyond the reasonable needs of the business; that the petitioner had no reasonable need to add to the earned surplus on hand at December 31, 1929, any part of the gains and profits of the years 1930, 1932, and 1933; and that it fails to show that such accumulation was not for the pur-

pose of preventing the imposition of the surtax upon its shareholders.

Reviewed by the Board.

Decision will be entered under Rule 50.

STERNHAGEN, dissenting: In my opinion, the evidence requires a finding that the petitioner was not availed of for the purpose of enabling its shareholder to escape surtax. The accumulation of earnings and profits was not for the purpose of reducing or preventing taxes but for the purpose of meeting the forthcoming demands occasioned by the termination of the Jersey Co.'s charter in 1940. This positive business purpose appears not alone from the testimony of Prince, but also from the testimony of others who have been intimately associated with the business for many years. These witnesses were entitled to belief and their testimony is credible and in no respect impugned or otherwise weakened either by cross-examination or countervailing testimony.

Throughout the existence of the corporation since 1911, the dominant objective has been to accumulate a surplus with which to acquire all of the Jersey Co.'s common and preferred shares by 1940 and liquidate its indebtedness and the outstanding indebtednesses of other companies which the liquidation would entail. There is no reason why the Board should be incredulous of the several statements of that continuous purpose. It would be reasonable to infer such a purpose even if there were no direct testimony that it existed. Furthermore, opinion witnesses for both the petitioner and the Government all testified that such a purpose would be reasonable. The only witnesses for the Government were three analysts who, after a study of the history and the probable future, agreed that the liquida-

tion of the Jersey Co. in 1940 was a desirable objective and that it would not be unreasonable to build up a fund to provide for it.

Despite this evidence, however, the Board holds from the circumstances that it will not be necessary to liquidate the Jersey Co. or the several indebtednesses which will then and soon thereafter become due, and concludes that the accumulation for that purpose is unnecessary and unreasonable. Upon these rationalized postulates, the Board, contrary to the only direct evidence in the record, holds that there was a purpose to prevent the imposition of the surtax upon the shareholder. Thus the single ultimate finding of fact upon which the imposition of the additional tax is expressly required by the statute to be conditioned is built up from circumstances many of which are beside the point of the statute. The purpose which the Board finds to exist is not an actual purpose but is a sort of constructive purpose, as if from the circumstances one must inevitably conclude that the conduct of the corporation and its officers could not reasonably have occurred unless the tax-saving purpose existed. Section 104, however, clearly requires the actual existence of the tax-saving purpose to support the 50 percent additional tax; and where the taxpayer by a fair preponderance of the evidence establishes that the purpose did not in fact exist, there is no justification for fabricating it by construction.

The corporation began its life as a vehicle to facilitate the reorganization which would be required in 1940. This is not questioned. Never throughout its history has there been a departure from this plan. It began in 1911 before there was any substantial corporation tax, before there was any constitutional power to impose an income tax, and many years before there was any thought of an individual surtax. There has been a uniform policy since 1923 to distribute a

dividend of 5 percent on the capital stock and accumulate the remaining earnings. There was no change in this policy in 1930 to denote a tax-saving purpose. This plan persisted without question throughout the years after the 1918 Act, when there was first imposed an additional tax upon the corporation by reason of the nondistribution of earnings.

During all the years since such a tax was first enacted it has been predicated on the purpose to prevent shareholders' surtax. Always this factor has been known to be a difficult one for the Government and a serious impediment to the collection of such taxes. Purpose has always been recognized as something hard for the Government to prove and easy for the taxpayer to disprove. Yet the tax with this condition was deliberately reenacted time and time again. It still exists in section 102 of the 1938 Act.[1] Not until the enactment, after vigorous legislative debate, of the Revenue Act of 1934 was a tax imposed on undistributed net income irrespective of purpose. This was in the personal holding company tax of Title I A. It was new and prospective legislation. Later, in section 14 of the 1936 Act, the undistributed profits tax was added. It is improper, therefore, for the Board, in 1940, to apply the 1928 and 1932 statutes as if they imposed the high additional tax upon all the corporation's net income although it had no purpose of preventing surtax on its shareholders. This is in effect to apply the later type of tax retroactively to a period when it was expressly and knowingly rejected by Congress. It is treating the language of the controlling statute as if it were a mere figure of speech.

If I understand the Board correctly, they say that the accumulation of $19,615,905.69 by December 31, 1929, was

[1] Section 102 of the 1938 Act still fixes purpose as a necessary condition of the tax but the presumption that an unreasonable accumulation evidences the disapproved purpose is made more difficult to overcome since the taxpayer must prove its absence of purpose by a clear preponderance of the evidence and not merely by enough evidence to overcome a prima facie case.

enough for the forthcoming needs of 1940, and that the profits added in 1930, 1932, and 1933 were therefore beyond the reasonable needs of the business and *ergo* only explicable as a means of tax avoidance for the shareholder. No doubt the Board has the power and the duty to determine whether gains or profits have been permitted to accumulate beyond the reasonable needs of the business; but the determination should be more than a substitution of the Board's judgment for that of the managers of the business—particularly when the Commissioner has made no determination on the subject. For myself, I am unable to draw a line at December 31, 1929, between the limit of reasonable accumulation and additions to it, label the latter as excessive and unreasonable, and, so labeled, regard the additions in the taxable years as a manifestation of the disapproved purpose.

To point to the fact that Prince began his stockyards venture with a comparatively small investment which has grown into a large fortune, and that in the intervening years his personal taxes and those of the petitioner have been relatively small, is to disclose a type of reasoning which, in my opinion, should have no place in tax adjudication. Nothing in the record discloses any actual or attempted escape from taxes imposed by law. This drastic additional tax can not be justified for the years in question by pointing to the extent to which the taxpayer and its shareholder have paid less than it is thought, by some nonlegal yardstick, that they should have paid. The tax, to be sure, was intended as a penalty; but that is the more reason why it should be applied with a careful regard for its terms and not sentimentally.

The loans which petitioner made to Prince were consistently used by him and his brokerage firm to buy the securities of stockyards corporations. Only once does it

appear that he used any of the borrowed funds for a private purpose. This was in 1932, when he used $160,000 for a short period to finance the construction of his Newport house until he could sell his North Shore place. The securities which petitioner loaned to Prince were used by him as collateral to secure loans from banks for the purchase of stockyards securities, and the cash which petitioner loaned to Prince was used for the purchase of similar securities. Prince paid interest to the petitioner at the going rate on the cash loans and the petitioner received the income upon the securities which it loaned to Prince for purposes of collateral. In view of the evidence that the loans were made to Prince because as a broker he was in good position to buy stockyards securities whenever they were available, and that this was, throughout the entire history of the company, an incident to its general plan, it is misleading to find, as the Board does, that "the loans were used by Prince for any purpose desired by him." There is a clear distinction between these loans to Prince in carrying out the petitioner's business plan and the loans to the president in *National Grocery Co.* v. *Helvering*, 304 U. S. 282. In that case the loans were used by the corporate officer to invest in wholly unrelated securities for a profit, just as they might have been used by him if they had been distributed to him in dividends. The amounts loaned to Prince during the taxable years did not serve the purpose of disguised dividends. In 1930 the loans actually decreased by $916,250. Over the four years, 1930-1933, the net amount loaned to Prince was $886,070. Included in this net was the loan in 1933 of $1,000,000 which Prince used in the purchase, for $1,057,000, of the Armour shares. This purchase was made to acquire control of the Armour stock so that the profitable Armour business would be kept in the stockyards enterprise. I think, therefore, that when the circumstances of all the loans by

petitioner to Prince are given consideration they lose force as indicating any purpose to enable him to have the personal use of petitioner's earnings and yet escape surtax.

It is said that Prince sold securities to the petitioner at a loss, which gave him a personal income tax deduction, and the petitioner took similar loss deductions on sales to Prince. Aside from the fact that the amounts were comparatively too small to be indicative of a purpose under section 104, the decision in *W. S. Farish & Co.*, 38 B. T. A. 150; affd., 104 Fed. (2d) 833, establishes that this has no place under that section. Such transactions in themselves have no significance in determining whether the corporation was availed of to prevent surtax on the shareholder "through the medium of permitting its gains or profits to accumulate instead of being divided or distributed."

I am, therefore, of opinion that the reasoning of the Board in reaching its conclusion is unsound. The taxpayer has shown affirmatively an absence of actual purpose to prevent the imposition of surtax upon its shareholder, and, since this is the crux of the case, the determination of the Commissioner that the case is one under section 104 should be reversed and the resulting deficiency set aside.

MURDOCK, LEECH, and KERN agree with this dissent.

[Title omitted.]

ORDER.

[Dated March 22, 1940.]

For good cause shown of record, it is ordered that in the printed findings of fact and opinion of the Board in the above-entitled proceeding promulgated March 20, 1940, page 23, first line of finding "38" the year "1933" be and the same is hereby deleted and that there be substituted in lieu thereof the year "1932."

CHARLES P. SMITH, *Member.*

[SEAL.]

[Title omitted.]

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION.

[Filed April 5, 1940.]

The attached proposed computation is submitted, on behalf of the respondent, to the United States Board of Tax Appeals, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Board, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Board, pursuant to the statutes in such cases made and provided.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
R. H. TRANSUE,
Special Attorney, Bureau of Internal Revenue.

STATEMENT.

IT:R:A-Recomp.
AJT

In re: Chicago Stock Yards Company,
Boston, Massachusetts.
B.T.A. Docket: No. 83797.
Income Tax Liability.

Years	Tax Liability	Tax Assessed	Deficiency
1930	$1,910,467.38	$92,781.28	$1,817,686.10
1932	1,158,819.15	13,496.47	1,145,322.68
1933	1,160,075.13	12,963.21	1,147,111.92
Total	$4,229,361.66	$119,240.96	$4,110,120.70

Chicago Stock Yards Company
Year ended December 31, 1930.

Schedule 1 Adjustments to Net Income

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)	$1,286,536.44
Net income as determined under Board of Tax Appeals decision promulgated March 20, 1940 (Section 21)	$1,286,536.44
Net income, deficiency notice (Section 104(c))	3,512,166.03
Net income, Board of Tax Appeals decision (Section 104(c))	$3,512,166.03

Explanation of Changes

The United States Board of Tax Appeals in a decision promulgated March 20, 1940, sustained the Commissioner for the year 1930.

Schedule 2 Computation of Tax

Net income, Schedule 1, (Section 21)	$1,286,536.44	
Tax at 12% (Section 13)		$154,384.37
Net income, Schedule 1 (Section 104(c))	$3,512,166.03	
Tax at 50% (Section 104(c))		1,756,083.01
Total tax liability		$1,910,467.38
Total previously assessed: Account #401545		92,781.28
Deficiency		$1,817,686.10

Chicago Stock Yards Company

Year ended December 31, 1932.

Schedule 3 Adjustments to Net Income

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)		$ 310,679.56
Net income as determined under Board of Tax Appeals decision promulgated March 20, 1940 (Section 21)		65,447.53
Net adjustment as computed below		$ 245,202.03
Net income, deficiency notice (Section 104(c))		$2,544,834.00
Net income, Board of Tax Appeals decision (Section 104(c))		$2,299,631.97
Net adjustment as computed below		$ 245,202.03
Nontaxable income and additional deductions:		
(a) Loss on sale of stock	$221,202.03	
(b) Assessment on shares of stock	24,000.00	
Total	$245,202.03	
Net adjustment as above		$ 245,202.03

Explanation of Items

(a) In accordance with a stipulation filed with the United States Board of Tax Appeals the petitioner is entitled to deduct a loss of $221,202.03 in 1932 on the sale of 3,050 shares of the Stock Yards National Bank and 240 shares of the Central Manufacturing District Bank to F. H. Prince and Company, Incorporated.

(b) It is stipulated that the petitioner is entitled for 1932 to a deduction not claimed on its return of $24,000.00 paid as an assessment made by the banking authorities of the State of Illinois against 240 shares of the Central Manufacturing District Bank owned by the petitioner.

Chicago Stock Yards Company

Year ended December 31, 1932.

Schedule 4 Computation of Tax

Net income, Schedule 3 (Section 21)	$65,477.53	
Tax at 13¾% (Section 13)		$ 9,003.16
Net income, Schedule 3 (Section 104(c))	2,299,631.97	
Tax at 50% (Section 104(c))		1,149,815.99
Total tax liability		$1,158,819.15
Total previously assessed: Account #401883		13,496.47
Deficiency		$1,145,322.68

Year ended December 31, 1933.

Schedule 5 Adjustments to Net Income

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)	$ 95,324.01
Net income as determined under Board of Tax Appeals decision promulgated March 20, 1940 (Section 21)	$ 95,324.01
Net income, deficiency notice (Section 104(c))	$2,293,936.16
Net income, Board of Tax Appeals decision (Section 104(c))	$2,293,936.16

Explanation of Changes

The United States Board of Tax Appeals in a decision promulgated March 20, 1940, sustained the Commissioner for the year 1933.

Chicago Stock Yards Company

Year ended December 31, 1932.

Schedule 6 Computation of Tax

Net income; Schedule 5 (Section 21)	$95,324.01	
Tax at 13¾% (Section 13)		$13,107.05
Net income, Schedule 5 (Section 104(c))	$2,293,936.16	
Tax at 50% (Section 104(c))		1,146,968.08
Total tax liability		$1,160,075.13
Tax previously assessed: Account #401650		12,963.21
Deficiency		$1,147,111.92

[Title omitted.]

MOTION TO MODIFY FINDINGS OF FACT AND FOR ADDITIONAL FINDINGS OF FACT.

[Filed April 18, 1940.]

Now comes the petitioner and moves that the Board modify its findings of fact and make additional findings of fact as follows:

1. By making an additional finding of fact as follows:

The facts contained in the stipulation of facts and the exhibits attached thereto filed in this case are true and we find them to be facts.

REASONS.

While the Board treated the facts in the stipulation as facts, there was no formal finding to that effect and one should be made.

2. By making an additional finding of fact as follows:

It is stipulated that the petitioner is entitled for 1932 to a deduction claimed on its return but disallowed by the Commissioner in his notice of deficiency in the amount of $221,202.03 representing a loss claimed upon the sale in that year of 305 shares of the capital stock of Stockyards National Bank and 240 shares of the capital stock of Central Manufacturing District Bank.

REASONS.

The finding requested was contained in paragraph 18 of the stipulation of facts filed in the case. We believe it was omitted from the report through inadvertence.

3. By striking out the sentence in finding of fact No. 20 reading as follows:

"F. H. Prince & Co. was and is the sole stockholder."

and substituting therefor the following:

F. H. Prince & Co. subscribed to all of the capital stock of Pau Corporation which was and is carried in the name of F. H. Prince & Co. for the benefit of the Maine Company.

REASONS.

The evidence on this point is undisputed and appears on page 364 of the record.

This finding is important because the finding as it stands in the report gives a false and misleading idea as to the status of the Pau Corporation. The petitioner was the equitable owner of the stock of the Pau Corporation, legal title to which was in F. H. Prince & Company. The Pau Corporation was and is an integral part of the stockyards enterprise.

4. By adding at the end of paragraph B of finding No. 22 the following:

The net consolidated assets of $73,322,871.58 and the excess of assets of $40,131,696.50 are taken from the consolidated return of the Jersey Company and its subsidiaries for 1929. Said figures include as assets a net write-up in the assets of the Transit Company amounting to more than Thirteen Million Dollars which was by stipulation between the parties eliminated from the surplus and asset accounts of the Transit Company.

REASONS.

This write-up is dealt with in the first two paragraphs on page 3 of the stipulation of fact filed in this case. As appears from page 3 of exhibit S-4 attached to the stipulation, this was a write-up of capital assets of the Transit Company in 1921. In fairness to the petitioner, any statement of the total assets as shown by books should not omit the fact agreed on by the parties that a very substantial portion of the value of the assets results from a write-up and is eliminated from surplus.

5. By adding at the end of paragraph C, finding No. 22, the following:

Said book value of Forty Million Dollars includes said net-write-up of more than Thirteen Million Dollars referred to above.

REASONS.

Reasons for this addition are the same as the reasons for the addition in paragraph 4.

6. By adding to finding No. 22 a new paragraph lettered D, as follows:

D. On December 31, 1933, the situation was as follows:

The Jersey Company still owned all of the shares of capital stock of the Transit Company, the Railway

Company, the Elevated Company, and the beneficial interest of the District, and filed a consolidated return for 1933, as it did for 1929, which included the operations of the above named wholly owned subsidiaries (including therein the operations of the Harness & Saddlery Company, a subsidiary of the Transit Company) and showed a net income of $77,431.82 for the entire group. The group had outstanding bonds as follows:

Jersey Company 5% bonds maturing 4/1/40	$10,000,000.00
Jersey Company 4% bonds maturing 4/1/40	4,000,000.00
Elevated 4% bonds maturing 3/1/45	2,327,000.00
District bonds maturing on various dates	2,250,000.00
TOTAL	$18,577,000.00
Net consolidated assets	$66,431,231.88
Net consolidated liabilities	29,528,781.93
EXCESS OF ASSETS	$36,902,449.95

Net consolidated assets of $66,431,231.88 and the excess of assets of $36,902,449.95 are taken from the consolidated return of the Jersey Company and its subsidiaries for 1933. Said figures include as assets the net write-up in the assets of the Transit Company amounting to more than Thirteen Million Dollars which was mentioned in paragraph B of finding of fact No. 22.

The Maine Company on December 31, 1933, had bonded indebtedness of $2,620,000.00, which, when added to the bonded indebtedness of the Jersey Company and its subsidiaries, amounted to a total bonded indebtedness of $21,197,000.00 for the entire group. Against this total bonded indebtedness were the following liquid assets:

PETITIONER	
Cash	$ 7,645,235.97
Accounts Receivable	45,285.50
Notes Receivable (Prince)	4,848,000.00
District 5's	30,747.00
Other Investments	1,333,989.27
PRODUCE TERMINAL	
Cash, etc.	111,186.07
TOTAL	$17,829,969.74

In addition to the above, the petitioner and the Jersey Company and its subsidiaries owned fixed and other assets of a book value on December 31, 1933, approximately Five Million Five Hundred Thousand Dollars greater than on December 31, 1929. Such assets on December 31, 1933, include subordinated deposits and investments in the Chicago banks having a book value in excess of Six Million Three Hundred Thousand Dollars.

The entire group of companies at all times material to this case required liquid working capital of at least Five Million Dollars.

REASONS.

The requested finding has been prepared in exactly the same manner, using the same set of figures for 1933 that the Board has used for 1929 in its finding No. 22. The evidence as to the amount of working capital required by the various companies appears in the record at pages 328 and 1110-1111.

The evidence as to the write-up is the same as appears in requested finding No. 4.

The requested finding is material and important because it shows what the net effect of the accumulations has been from 1929 through 1933 and is requested in support of the petitioner's contention, not recognized by the Board as a matter of law, that it was a reasonable business need of the

petitioner to accumulate funds to meet the obligations of the Jersey Company and its subsidiaries in 1940.

7. By adding to finding of fact No. 23 the following:

> At the time the transactions herein set forth were entered into, the petitioner anticipated that such transactions would result in a substantial loss to each of the companies participating in these transactions. By December 31, 1933, it was anticipated that the total loss would exceed $5,000,000; and at the time of trial it appeared that this anticipation was justified.

REASONS.

The evidence supporting the requested additional finding was uncontradicted and appears in the record at pages 273-308.

The requested finding is material in support of the petitioner's contention that the accumulations of earnings during the years in question by the petitioner were reasonable when all circumstances are taken into consideration, including the anticipated losses in the bank situation.

8. By striking out the sentence beginning at the bottom of page 11 of the report and inserting in lieu thereof the following:

> The amount of the debt at the end of each year from 1918 to 1925, inclusive, was as follows:

1918	$3,433,694.35
1919	3,3[illegible]2,448.19
1920	3,362,234.13
1921	1,712,441.52
1922	717,001.28
1923	497,396.64
1924	269,352.26
1925	40,460.37

REASONS.

The above table presents a much fairer picture of the indebtedness of the petitioner to F. H. Prince & Co. than the one contained in the report. The table is taken from figures appearing in S-65 attached as an exhibit to the stipulation of facts agreed upon in this case.

9. By striking out the last paragraph of finding of fact No. 24 in its report and substituting therefor the following:

The loans which the petitioner made to Prince were consistently used by him and his brokerage concern to buy securities of the stockyards corporations in which the petitioner had an interest or to restore to his brokerage firm money which had been expended by it in acquiring such securities, with the exception of one sum of $160,000 which Prince borrowed from the petitioner in 1932 for a short period to finance the purchase of his Newport house until he could sell his North Shore place. The securities which the petitioner loaned to Prince were used by him as collateral to secure loans from banks for the purchase of similar securities. In 1933 the petitioner loaned an amount of approximately $1,000,000 to Prince to enable him to acquire shares of stock of Armour & Co. In that year Prince purchased Armour & Co. common A and B shares and preferred stock at a cost to him of $1,067,389.50. With this acquisition of stock of Armour & Co., Prince became chairman of the Board of Directors of Armour & Co. In 1930 the loans of cash and securities actually decreased by $916,250. Over the four years, 1930-1933, the net amount of cash and securities loaned by the petitioner to Prince was $886,070. Included in this was the loan in 1933 of $1,000,000 which Prince used in the purchase for $1,067,389.50 of the Armour shares. This purchase was made to acquire

control of the Armour stock so that the profitable Armour business would be kept in the stockyards enterprise.

REASONS.

The requested findings are in accordance with the uncontradicted evidence. There was no evidence that "the loans were used by Prince for any purpose desired by him." The purposes of the loans were testified to and the testimony was not contradicted. The purposes distinctly were not "any purpose desired by him" but perfectly definite purposes.

10. By adding to finding No. 34 the following:

All of the securities sold by F. H. Prince & Co. to the petitioner in 1931, 1932 and 1933 were marketable securities; were sold by it to the petitioner at market value. The total of the sale price of such of said securities as were sold by the petitioner and the market value of such as were held by it at the time of the trial exceeded the cost to the petitioner by a substantial amount.

REASONS.

The testimony supporting this finding is clear and uncontradicted. It appears in the record at pages 1126-1129 and in exhibit 47. The petitioner deems it important, as the evidence clearly shows, that it be a part of the findings of fact that the securities which the petitioner purchased from Prince were of a kind which could be turned into cash at a moment's notice and at a price in excess of the amount which the petitioner paid for them.

11. By striking out that portion of finding No. 35, beginning with the sentence "Prince handled the stockyards banking situation from 1930 to 1933" to the end of the finding and substituting the following therefor:

The Maine Company handled the stockyards banking situation from 1930 to 1933. Ultimate choice as to officers, directors, and other personnel was dictated by the Maine Company and it decided dividend policies. It also gave instructions as to the banks in which funds were to be deposited and its authority was necessary for unusual expenditures by the Transit Company. After the destruction of part of the stockyards by fire, the president and vice-president of the Maine Company went to Chicago and gave orders as to what buildings should be rebuilt and how. The yards were not entirely restored. The restoration was paid for with insurance funds received by the Transit Company. In certain instances suggestions of the officers in Chicago were rejected by the Maine Company. In 1933 it refused to permit the Transit Company to spend enough money to build fireproof hog and sheep houses requested by the men in Chicago. It granted permission to rebuild the amphitheatre in which the International Live Stock Exposition was held.

REASONS.

This modification is requested as being in accord with the uncontradicted evidence contained in the record. (Record pages 102-111; 222, 247-252; 313-316.)

It is true that at times the statement is made by witnesses that decisions were made by Mr. Prince, but it is submitted that such statements, with their context, offer no warrant for the Board's finding that Mr. Prince, in giving orders or taking actions touching the subsidiaries of the Jersey Company and the Produce Terminal Corporation was acting in any capacity other than that of president of the Maine Company or that his authority to control the

matters was recognized as being other than that of the president of the Maine Company.

12. By striking out the first sentence of finding of fact No. 41 and substituting therefor the following:

> During the years 1930-1933, inclusive, and prior thereto the principal activity of the petitioner was the purchase and holding of securities, primarily securities of the Jersey Co., the collection of dividends thereon, the management of the Jersey Co. and its subsidiaries, and the management of the Produce Terminal Corporation. During this period these activities included the supervision and direction by the Maine Company of the investment of more than $10,000,000 by the Maine Company, the Produce Terminal Corporation, the District, and The Transit Company, in Chicago banks connected with the stockyards, in a successful effort to prevent the business of the stockyards from being injured by the failure of these banks. During this same period another activity of the petitioner was the lending of money to F. H. Prince and his brokerage concern for the purpose of putting them in funds so that they might purchase securities for the benefit of the petitioner.

REASONS.

Finding of fact No. 41, as contained in the report, is incomplete in that it fails to include the very important activity of the Maine Company during the years in question in connection with the salvaging of the Chicago banks—an activity so vital to the continued success of the stockyards. The finding of fact, as contained in the report, is also misleading and at variance with the facts in respect to the loans. In connection with the loans, reference is made to paragraph 9 of this Motion. It is highly inaccurate to find that the principal activity of the petitioner in the

year 1930 was "the lending of money to F. H. Prince", since in that year the loans to F. H. Prince in fact diminished. Furthermore, in other years all such loans as were made were to further the interest of the petitioner, with the exception of the loan of $160,000 which has been referred to in paragraph 8 of this Motion.

13. By making an additional finding of fact as follows:

The experts called in by the petitioner (two in number) and the experts called in by the respondent (three in number) were unanimous in the opinion that it was sound business policy to liquidate the Jersey Company in 1940.

REASONS.

The testimony supporting this finding was undisputed. Mr. Blough, a witness for the petitioner, testified to this effect (R., pp. 509-510). Mr. Walker, a witness for the petitioner, testified to this effect (R., pp. 630-631). Mr. Merriman, an expert called by the respondent, testified to this effect in cross-examination (R., p. 830). Mr. Atkins, an expert called by the respondent, testified to this effect in cross-examination (R., pp. 1035-1039). Dr. Friday, an expert called by the respondent, testified to this effect in direct (R., p. 1032). These witnesses were businessmen or economists and there were no other opinion witnesses.

The requested finding is material in support of the petitioner's contention, not recognized by the Board as a matter of law, that it was a reasonable business need of the petitioner to accumulate funds to meet the obligations of the Jersey Company and its subsidiaries in 1940 which would have to be met upon liquidation of the Jersey Company.

14. By making additional finding of fact as follows:

At all material times it was sound business policy for the petitioner to plan to liquidate the Jersey Company in 1940.

REASONS.

The reasons for requesting this finding are identical with those stated in respect to requested finding 13.

15. By making an additional finding of fact as follows:

The petitioner was not formed for the purpose of preventing the imposition of the surtax on its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

REASONS.

While this appears in the Board's opinion, it should appear as a finding of fact as well.

16. By making an additional finding of fact, as follows:

From the time when the petitioner was formed, the petitioner contemplated the liquidation of the Jersey Company upon the expiration of its charter on July 10, 1940. With that end in view, shortly after its formation the petitioner began to accumulate earnings. Out of the earnings so accumulated the petitioner purchased as many shares of the Jersey Company common stock as became available from time to time at reasonable prices.

REASONS.

The formation of the plan was testified to by Mr. Prince (R., pp. 410-413; 423-424). See also the testimony of other witnesses as to the existence of the plan (R., pp. 109-110; 257; 320-321; 323; 328; 288; 631). That the plan was acted upon appears in finding No. 33 of the Board's report.

The evidence supporting this finding was uncontradicted and there is no dispute as to these facts. The requested finding is material because the tax is based on purpose and the purpose for which accumulations took place is material.

17. By making an additional finding of fact, as follows:

The purpose of the petitioner in accumulating earnings during the years 1930 to 1933, inclusive, as well as prior thereto, was to acquire sufficient liquid assets to purchase all Jersey Company common stock that could be purchased before 1940 at a reasonable price, to pay off all of the bonds of the petitioner and of the Jersey Company and its subsidiaries by 1940, and to pay off all the outstanding preferred stock of the Jersey Company in 1940.

This plan, as at the close of the year 1929, contemplated an accumulation of cash and liquid assets in the treasury of the petitioner, its subsidiary, Produce Terminal, and the Jersey Company and its subsidiaries, of approximately $36,000,000 divided as follows:

Total bonded indebtedness	$23,963,000.00
Preferred stock Jersey Company (64,543 shares)	6,454,300.00
Common stock Jersey Company (6,258 shares)	1,034,134.50
Working capital	5,000,000.00
Total	$36,451,434.50

REASONS.

This requested finding appears in substance in the Board's opinion on pages 30, 31, 32. While the Board states that it is its opinion that the petitioner had no reasonable business need to formulate or carry out such a plan, the petitioner is entitled to have the existence of the plan found as a fact.

The evidence as to the existence of the plan was uncontradicted. Its existence was not questioned by the Government. The attack on the plan was simply and solely that the plan was not one within the reasonable needs of the petitioner.

The figures referred to in the requested finding are taken from the opinion of the Board on page 31.

18. By making an additional finding of fact as follows:

During the years 1922-1933, inclusive, the petitioner withdrew from the Jersey Company and its subsidiaries in dividends more than the net earnings of the Jersey Company and its subsidiaries for that period available for distribution to the petitioner.

REASONS.

This requested finding is based on undisputed evidence and appears graphically in exhibit 40. Testimony as to how exhibit 40 was prepared appears in the record, pages 524-543. This requested finding is material and is important since it strongly negatives any intention to accumulate earnings in the Maine Company to avoid the imposition of a surtax on its shareholders. The simple method to have obtained that result would have been to retain earnings of the enterprise at the level of the Jersey Company to meet its debts or below that level in the operating companies. For example, in 1933, as appears in finding of fact No. 29 contained in the report, the Transit Company had a loss of over $800,000, but paid dividends which found their way to the Maine Company amounting to $1,716,000. If the forbidden purpose had been in the mind of the petitioner, the Transit Company surely would have paid no dividends in 1933.

19. By striking out finding of fact No. 44 and substituting therefor the following:

During the years 1930, 1932 and 1933, the petitioner was not a mere holding or investment company.

REASONS.

The finding as it appears in the report is against the evidence, the weight of evidence, and is contrary to law.

20. By striking out finding of fact No. 45 and substituting therefor the following:

> During the years 1930, 1932 and 1933, the petitioner did not permit its gains and profits to accumulate beyond the reasonable needs of its business.

REASONS.

The finding in the report is against the evidence, the weight of the evidence, and is contrary to law.

21. By striking out finding of fact No. 46 and substituting therefor the following:

> During the years 1930, 1932 and 1933, the petitioner was not availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

REASONS.

The finding in the report is against the evidence, the weight of evidence, and is contrary to law.

The petitioner requests that it be heard orally on this motion.

JOSEPH N. WELCH,
60 State Street,
Boston, Massachusetts.

SWAGAR SHERLEY,
730 15th Street, Northwest,
Washington, D. C.,
Counsel for Petitioner.

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 83797.

CHICAGO STOCK YARDS COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

MOTION FOR FURTHER HEARING.

Now comes the petitioner in the above entitled case and moves that the Board grant a further hearing in this case to the extent that the Board shall set the case down for oral argument by counsel for the petitioner and the respondent before the full Board or a division of the Board.

REASONS FOR MOTION.

This case has now been decided by a majority of the Board upon findings of fact and opinion prepared and filed by Honorable C. P. Smith, Member. Counsel therefore find themselves faced with findings of fact and an opinion prepared by a Member of the Board who did not have the opportunity to hear the witnesses and observe their demeanor on the stand, and did not have the opportunity to listen to oral arguments by counsel. The record is long and the exhibits extraordinarily voluminous. Evidence as to the ultimate question of intent is at widely separated points in the transcript and in the exhibits. It is not even probable that the attention of the Member of the Board who prepared the findings of fact and the ma-

jority opinion could have been called to all the evidence bearing on the question of intent and it is certainly highly improbable that the force of that evidence could have been made as clear to such Member from a reading of the record and exhibits alone as it could be made upon oral argument.

The ultimate question in the case is one of the intent which governed the activities of the Maine Company during the years 1930 to 1933. A search through written words and figures, however painstaking, is at best a poor substitute for an actual observation of the witnesses on the stand, listening to their words as to the intent which led to the formulating of the business policies of the petitioner. The full Board did not hear the witnesses or observe them. But the full Board, or a division, at least, if this motion be granted, can hear argument which, while a poor substitute for live witnesses, is an improvement over searching for intent in a mass of written words and figures.

As the case stands, if the present findings of fact and opinion are to remain the findings of fact and the opinion of the Board, counsel for the petitioner has not had a "hearing" in the full sense of that word and cannot have had such a "hearing" unless this motion be granted.

The petitioner respectfully requests that it be heard orally on this motion.

JOSEPH N. WELCH,
60 State Street,
Boston, Massachusetts.

SWAGAR SHERLEY,
730-15th Street, Northwest,
Washington, D. C.,
Counsel for Petitioner.

[Title omitted.]

MOTION FOR REHEARING AND FURTHER HEARING.

[April 18, 1940.]

Now comes the petitioner in the above entitled case and moves for a rehearing and for a further hearing on the grounds of newly discovered evidence; and in support of such Motion attaches hereto the affidavit of James A. McDonough setting forth the substance of the newly discovered evidence.

REASONS IN SUPPORT OF MOTION:

When the case was tried in February 1939 the evidence could not go beyond the point that it was and always had been the plan of the petitioner to liquidate the Jersey Company in 1940 and to accumulate funds for that purpose. During the period of time that has elapsed between the trial of the case and the promulgation of the Board's report on March 20, 1940, those plans have been so far advanced and such important and conclusive action leading up to such liquidation taken that evidence may now be offered showing that the liquidating of the Jersey Company is now fully embarked upon and has been removed from the field of a mere plan as was testified to at the trial into the field of reality.

The Board, in its report promulgated March 20, 1940, gave no effect to the testimony of the witnesses for the petitioner who testified that the primary purpose of accumulating surplus in the Maine Company was that of effecting the liquidation of the Jersey Company on the expiration of its charter in 1940. The Board apparently took this course for either one of two reasons, or both:

First, because as a matter of law the Board believed that

it was not a reasonable business need of the petitioner to accumulate funds to provide the amount required to carry out the liquidation of the Jersey Company (Report, pp. 30-32), or

Second, because the Board did not believe the testimony of the petitioner's witnesses who testified that the liquidation would in fact take place (Report pp. 35-36).

The newly discovered evidence which the petitioner seeks to introduce upon a rehearing bears upon the second reason and clearly demonstrates that the Board's reason for rejecting such testimony was based on a hypothesis which is contrary to uncontrovertible facts. This evidence was not in existence or available to the petitioner at the time of the trial in February 1939 but has come into existence and become available since that time. In view of the Board's expressed belief, it is of critical and decisive importance consisting as it does of direct and positive evidence based entirely upon facts which cannot be controverted of the intent with which the petitioner's surplus was accumulated. A final decision of the case without the receipt of such evidence would result in a decision being reached purely upon the basis of hypothesis in contrast to a solid basis of fact and without the Board having before it the most cogent evidence on the issue of intent that could possibly be offered.

The petitioner respectfully requests that it be heard orally on this motion.

(s) Joseph N. Welch,
60 State Street,
Boston, Massachusetts.

(s) Swagar Sherley,
730-15th Street, Northwest,
Washington, D. C.
Counsel for Petitioner.

[Title omitted.]

AFFIDAVIT OF JAMES A. McDONOUGH IN SUPPORT OF PETITIONER'S NOTICE MOTION FOR REHEARING AND FURTHER HEARING.

James A. McDonough, being first duly sworn, deposes and says as follows:

I am a Director, Vice President and Executive Officer of Chicago Stock Yards Company (hereinafter called the Maine Company), and I am Vice President and Executive Officer of the Chicago Junction Railways and Union Stock Yards Company (hereinafter called the Jersey Company).

For many years I have been actively engaged in making plans and financial arrangements looking toward the liquidation of the Jersey Company on the expiration of its charter on July 10, 1940. Since January 1, 1939 substantially all of my time has been devoted to this problem.

During 1939 and continuing in 1940 the Maine Company has continued its policy of acquiring securities of the Jersey Company for the purpose of owning 80% of the voting stock of that company by July 10, 1940 so that the Jersey Company may be liquidated tax free under I. R. C. Sec. 112 (b) (6). Between the trial and the date of this affidavit the Maine Company acquired 290 shares of common stock of the Jersey Company and 29,342 shares of preferred stock of the Jersey Company for that purpose both of which classes of stock have full voting rights. As of the date of this affidavit the Maine Company had acquired and owned 64,656 shares of Jersey common and 31,563 shares of Jersey preferred and more stock was steadily being purchased.

During the last half of 1939 and continuing until the present time I have been in active negotiations with finan-

cial institutions with a view to securing a loan of $14,000,000 to the Maine Company with a view to combining the proceeds of such loan with the liquid assets of the Maine Company and the Jersey Company for the purpose of discharging the obligations of the Jersey Company and retiring its preferred stock and liquidating its common stock. These negotiations are still continuing and are at the moment in a very active stage.

At a meeting of the Board of Directors of the Jersey Company held at the agency of the company, Room 3722, 70 East 45th Street, New York City, on March 12, 1940 the following votes were passed:

Voted: That this Company declare out of surplus earnings applicable to dividends, two quarterly dividends, each in the sum of 1½% per share, on the 65,000 shares of outstanding preferred stock of the company, such quarterly dividends to be payable April 1, 1940 and July 1, 1940 respectively to preferred stockholders of record of the Company at the close of business on March 15, 1940; and that the Treasurer be instructed to transmit the full amount of both quarterly dividends (aggregating $195,000 for both dividends) to Old Colony Trust Company to be by it paid, when the respective dividends become payable, to the preferred stockholders of record of this Company at the close of business on March 15, 1940.

Voted: That the Treasurer of this Company be instructed to request Chicago Junction Railway Company to forward $330,000 to Guaranty Trust Company of New York on March 15, 1940 to cover interest payable April 1, 1940 on this Company's $14,000,000 principal amount of bonds secured by its mortgage dated April 10, 1900 as amended.

Voted: That Guaranty Trust Company of New York

be requested and directed to apply all cash ($2,675,000) held by it, as Trustee under the Company's mortgage dated April 10, 1900 as amended, to the payment on April 1, 1940 of the principal of this Company's $14,000,000 principal amount of bonds then due secured by such mortgage as amended and maturing April 1, 1940; and further

Voted: That Guaranty Trust Company of New York be requested and directed to apply all cash ($4,145,000) held by it, as Trustee under three trust agreements between this Company and Guaranty Trust Company of New York dated respectively December 20, 1937, December 27, 1938 and December 13, 1939, to the payment on April 1, 1940 of the principal of this Company's $14,000,000 principal amount of bonds secured by its mortgage dated April 10, 1900 as amended and maturing April 1, 1940; and further

Voted: That this Company borrow $4,000,000 from Guaranty Trust Company of New York and give therefor this Company's collateral note in the usual form due three months from the date thereof with interest at the rate of 1½% per annum, plus the usual premium for the privilege of anticipating maturity, secured by the 151,084 shares of the capital stock of The Union Stock Yards and Transit Company of Chicago and the 54,994 shares of the capital stock of Chicago Junction Railway Company now pledged under this Company's mortgage dated April 10, 1900 as amended; and that, upon receipt by this Company of such $4,000,000, the Treasurer of this Company be authorized and directed, in the name and on behalf of this Company, to execute and deliver such collateral note and the collateral therein described to Guaranty Trust Company of New York, and to deposit such $4,000,000 with Guaranty

Trust Company of New York, as Trustee under this Company's mortgage dated April 10, 1900 as amended, to be by such Trustee applied on April 1, 1940 to the payment of the principal of this Company's $14,000,000 principal amount of bonds secured by such mortgage as amended and maturing April 1, 1940; and further

Voted: That this Company borrow $1,000,000 from Chicago Stock Yards Company and give therefor this Company's unsecured note due three months from the date thereof with interest at the rate of 1½% per annum; and that, upon receipt by this Company of such $1,000,000, the Treasurer of this Company be authorized and directed, in the name and on behalf of this Company, to execute and deliver such unsecured note to Chicago Stock Yards Company and to deposit such $1,000,000 with Guaranty Trust Company of New York, as Trustee under this Company's mortgage dated April 10, 1900 as amended, to be by such Trustee applied on April 1, 1940 to the payment of the principal of this Company's $14,000,000 principal amount of bonds secured by such mortgage as amended and maturing April 1, 1940; and further

Voted: That the Treasurer of this Company be authorized and directed to draw from this Company's free cash and to deposit with Guaranty Trust Company of New York, as Trustee under this Company's mortgage dated April 10, 1900 as amended, $2,180,000 to be by such Trustee applied on April 1, 1940 to the payment of the principal of this Company's $14,000,000 principal amount of bonds secured by such mortgage as amended and maturing April 1, 1940; and further

Voted: That the Treasurer of this Company be authorized and directed, in the name and on behalf of this

Company, to execute and deliver all instruments, pay all amounts and perform all acts that may be necessary or proper (a) to discharge all obligations of this Company under its mortgage dated April 10, 1900 as amended, including all payments due the holders of the bonds and the Trustee thereunder and (b) to effect the discharge of such mortgage as amended; and (c) to free from the lien of such mortgage as amended all shares of stock of The Union Stock Yards and Transit Company of Chicago and of Chicago Junction Railway Company pledged thereunder.

The purpose of the first of the foregoing votes was as follows:

Large blocks of preferred stock of the Jersey Company are held by trustees. The Maine Company was purchasing such stock so that the Maine Company might own 80% of the voting stock of the Jersey Company, by offering to such trustees par plus an amount equal to dividends which would accrue on the preferred stock from the last prior dividend date to the date of liquidation, namely, July 10, 1940. Resistance was encountered because trustees felt that if they sold their preferred shares upon such a basis they would have difficulty in determining how much, if any, of the sales price was income which would be available to beneficiaries of their trusts who were entitled to income. They felt that they would prefer to hold their stock and receive dividends and the liquidating value in normal course. To the end that it might be possible to purchase such stock from such trustees at a date substantially before July 10, 1940, the foregoing vote was passed which provided that all preferred stock should be ex all dividends on March 15, 1940 so that at any date thereafter a preferred shareholder could receive par for his stock and he would receive dividends in the form of dividends in normal course if he held

his stock on that date; such dividends being income for the beneficiaries of income.

As a result of this vote trustees who were unwilling to sell their stock prior to March 15, 1940 to the Maine Company have since made such sales in substantial amounts.

On February 2, 1940 the Directors of the Jersey Company passed the following resolution:

> Resolved: That the officers of this Company be and they are hereby instructed to prepare the annual report of the Company for 1939 and mail the same to stockholders of record February 20, 1940 as soon as possible after that date.

In accordance with this resolution the Forty-Ninth Annual Report of the Jersey Company was mailed on March 12, 1940 to all stockholders of record. A copy of this report is attached to and made a part of this affidavit. For convenience the last paragraph of said report is quoted below:

> "The period for which the Company was organized to carry on business expires by limitation on July 10th, 1940. After July 10th, 1940, the Company will continue as a corporation for the purpose of liquidating its affairs and dividing its capital, but not for the purpose of continuing the business for which it was established."

On March 14, 1940 there appeared in Standard Corporation Records the following notice:

> "TWO QUARTERLY DIVIDENDS DECLARED ON PREFERRED—Directors of company declared two quarterly dividends of $1.50 a share each on 5% preferred stock, one payable April 1 and the other July 1, both to holders of record March 15, 1940.
>
> "This was in accordance with plans to liquidate the company and these dividends constituted final pay-

ments to be made on preferred. Purchasers of stock after March 15, 1940, thus would be entitled only to $100 a share in liquidation."

On March 27, 1940 the Directors of the Maine Company passed the following votes:

Voted: That this corporation offers to loan $5,000,000 to The Chicago Junction Railways and Union Stock Yards Company, on or before April 1, 1940, on the following terms:

1.—The borrower will give its collateral note in the usual form for the principal sum of the loan, such collateral note to mature December 31, 1941 subject to the borrower's option to anticipate payment, to bear interest at 1½% per annum until July 10, 1940 and thereafter at 3% per annum, and to be secured by 132,000 shares of the capital stock of The Union Stock Yards and Transit Company of Chicago and 55,000 shares of the capital stock of Chicago Junction Railway Company.

2.—This corporation will accept, in full payment of the principal of the collateral note, shares of stock of The Union Stock Yards and Transit Company of Chicago and of Chicago Junction Railway Company at their fair value at the time such principal amount is repaid.

3.—This corporation may, at its option, repledge as security for loans now or hereafter made to it, all or any part of the shares of The Union Stock Yards and Transit Company of Chicago and or Chicago Junction Railway Company: PROVIDED that the amount of loans to this corporation, as security for which such shares are repledged, shall not exceed the amounts loaned by this corporation to The Chicago Junction Railways and Union Stock Yards Company; and PRO-

VIDED, FURTHER, that the maximum number of such shares so repledged shall not exceed that fractional part of all outstanding stock of The Union Stock Yards and Transit Company of Chicago and of Chicago Junction Railway Company, respectively, that equals the fractional part of outstanding common stock of The Chicago Junction Railways and Union Stock Yards Company at the time owned by this corporation; and further

Voted: That the Vice-President be empowered to take all action by him deemed necessary or proper to carry out the purpose and intent of the foregoing vote.

On March 27, 1940 the Directors of the Jersey Company passed the following votes:

Voted: That all votes relating to the payment of the principal of this Company's bonds secured by its mortgage dated April 10, 1900 as amended which were passed by the Directors of this Company at their meeting held March 12, 1940, be rescinded; and further

Voted: That this Company accepts the offer of Chicago Stock Yards Company to loan it $5,000,000 upon the terms set forth in the vote above set forth in these minutes this day passed by Chicago Stock Yards Company, and authorizes and directs the Treasurer of this Company to effect such loan on the terms in such vote set forth.

Voted: That the Treasurer of this Company, on or before April 1, 1940, deposit $7,180,000 with Guaranty Trust Company of New York, as Trustee under this Company's mortgage date April 10, 1900 as amended, with instructions that the Trustee apply the same, together with cash in the sum of $2,675,000 now held by Guaranty Trust Company of New York as such Trustee and cash in the sum of $4,145,000 now held by Guaranty Trust Company of New York as Trustee under three

trust agreements dated respectively December 20, 1937, December 27, 1938 and December 13, 1939, to the payment on April 1, 1940 of the principal ($14,000,000) of this Company's bonds secured by such mortgage and then maturing.

Voted: That the Treasurer of this Company be authorized and directed, in the name and on behalf of this Company, to execute and deliver all instruments, pay all amounts and perform all acts that may be necessary or proper to discharge all obligations of this Company under its mortgage dated April 10, 1900 as amended and to effect the discharge of such mortgage as amended and to free from the lien of such mortgage as amended all shares of stock of The Union Stock Yards and Transit Company of Chicago and of Chicago Junction Railway Company pledged thereunder.

On March 27, 1940 the Jersey Company borrowed from the Maine Company the sum of $5,000,000 the proceeds of such loan to be devoted to the liquidation of the Jersey Company and on that date the Jersey Company gave its note payable to the Maine Company in said sum.

On March 30, 1940 the Jersey Company delivered to the Guaranty Trust Company of New York, the Trustee under its bond mortgage, certified checks totaling $7,180,000 together with a letter reading as follows:

"March 30, 1940

"In re: The Chicago Junction Railways and Union Stock Yards Company Mortgage and Deed of Trust dated April 10, 1900 under which its Four Per Cent Forty Year Mortgage and Collateral Trust Refunding Gold Bonds due April 1, 1940 and its Five Per Cent Forty-Year Mortgage and Collateral Trust Refunding Gold Bonds due April 1, 1940 were issued.

Guaranty Trust Company of New York, as Trustee,
140 Broadway,
New York, N. Y.

Gentlemen:—

We deliver to you herewith our certified checks for $7,180,000 to your order, the proceeds of which, together with the balance of $2,675,000 in the Trustee Account under the above Indenture, and the $4,145,000 held by you under our Letters of Instruction dated December 20, 1937, December 27, 1938 and December 13, 1939, you are instructed to apply to the redemption on and after April 1, 1940 of the bonds described above. These funds, aggregating $14,000,000, are deposited with you as Trustee in trust to be held by you for the sole purpose of paying said bonds.

We hand you herewith two copies of a discharge of mortgage pertaining to the mortgage described above, which we request that you execute and deliver in two counterparts.

In connection with our request for the execution of a discharge of the mortgage, we hand you herewith agreement dated March 27, 1940, indemnifying you against liability on account of such satisfaction, and also a certified copy of a resolution of the Board of Directors of this Company adopted March 27th, 1940 authorizing the request for satisfaction of the mortgage and the execution of the indemnity agreement.

Please deliver the collateral held under the above mortgage to undersigned Vice President.

Yours very truly,

THE CHICAGO JUNCTION RAILWAYS AND
UNION STOCK YARDS COMPANY

JAMES A. McDONOUGH
Vice President"

The instructions contained in this letter were carried out on or about April 1, 1940.

The Jersey Company caused the Old Colony Trust Company to enclose to all preferred stockholders of the Jersey Company with the April 1, 1940 dividend checks to such stockholders the following notice:

"IMPORTANT

"To the Holders of Preferred Stock of The Chicago Junction Railways and Union Stock Yards Company:

The charter of this Company expires on July 10, 1940. Accordingly, the directors of this Company declared two dividends of 1½% each on its preferred stock, payable on April 1 and July 1 to preferred stockholders of record on March 15, 1940. These are the final dividends on preferred stock which this Company will pay before the above-mentioned expiration date.

On July 10, 1940, the holders of preferred shares will also become entitled to ten days' interest from July 1 to July 10 at six per cent, or 16⅔ cents per share, plus par ($100 per share) in liquidation; and on and after that date, OLD COLONY TRUST COMPANY, 17 Court Street, Boston, Massachusetts, will pay you par ($100 per share) plus 16⅔ cents per share for each share of preferred stock of this Company which you deliver to it properly executed.

Any preferred stockholder desiring to dispose of his preferred shares at the same price ($100.16⅔ per share) before July 10, 1940, may do so by delivering his certificates therefor duly endorsed for transfer to THE FIRST BOSTON CORPORATION, 1 Federal Street, Boston, Massachusetts, prior to July 10, 1940. This will give present preferred shareholders the opportunity to reinvest the proceeds between now and July 10.

CHICAGO JUNCTION RAILWAYS AND
UNION STOCK YARDS COMPANY.

April 1, 1940"

/s/ James A. McDonough

The Commonwealth of Massachusetts
Suffolk, ss.

Subscribed and sworn to before me this 12th day of April, 1940.

/s/ Josephine A. Kraft
Notary Public.

My Commission Expires: March 24, 1945.

[Notarial Seal.]

[Title omitted:]

DIRECTORS: Francis B. Keeney, Providence, R. I., Weymouth Kirkland, Chicago, Ill., Arthur G. Leonard, Chicago, Ill., James A. McDonough, Boston, Mass., Bradford Norman, Jr., Newport, R. I., Mark W. Potter, New York City, Joseph W. Powell, Boston, Mass., Frederick H. Prince, Newport, R. I., Charles B. Wiggins, New York City.

OFFICERS OF THE COMPANY: *President*, Frederick H. Prince; *Vice-Presidents*, James A. McDonough, Mark W. Potter; *Secretary and Treasurer*, James A. McDonough; *Auditors*, Martin, Johnson & Co., Certified Public Accountants, Chicago.

THE CHICAGO JUNCTION RAILWAYS
and
UNION STOCK YARDS COMPANY

15 Exchange Place, Jersey City, N. J.

FORTY-NINTH ANNUAL REPORT SUBMITTED TO THE STOCKHOLDERS AT THE ANNUAL MEETING, MARCH 12TH, 1940.

Jersey City, N. J., March 12th, 1940.

TO THE SHAREHOLDERS:

Herewith is submitted the annual report of the operations of the properties for the year ended December 31st, 1939, which embodies a combined statement of the earnings of the Union Stock Yard & Transit Company, the Chicago Junction Railway Company and of your Company for the years 1930 to 1939, inclusive.

A comparative statement of the annual gross and net earnings of the Transit Company, the Railway Company and the New Jersey Company for the years ended December 31st, 1930, to December 31st, 1939, is as follows:

Year	Gross	Taxes, Interest and Operating Expenses	Net
†1939	$5,662,472.82	$3,274,920.10	$2,387,552.72
1938	5,577,775.09	3,265,028.12	2,312,746.97
1937	5,701,208.07	3,063,459.12	2,637,748.95
1936	5,479,954.86	2,799,671.90	2,680,282.96
*1935	5,104,300.90	2,679,902.44	2,424,398.46
*1934	5,560,460.01	3,020,290.74	2,540,169.27
*1933	5,489,824.67	3,091,631.82	2,398,192.85
*1932	5,515,167.16	3,610,236.39	1,904,930.77
*1931	6,004,335.17	3,883,557.36	2,120,777.81
*1930	6,028,915.83	3,859,994.64	2,168,921.19

† Exclusive of profit on sale of $2,500,000. Indiana Harbor Belt R. R. 4% Bonds.
* Exclusive of earnings from real estate investments.

The following is a Comparative Statement of the Live Stock and Car Receipts for the two years ending, respectively, December 31st, 1938, and December 31st, 1939:

	Cattle	Calves	Hogs	Sheep	Horses	Cars By Rail	No. of Trucks
1939	1,818,494	312,052	4,263,810	2,498,869	7,948	81,193	147,816
1938	1,884,553	325,143	4,188,055	2,563,807	8,866	88,386	135,407
Increase			75,755				12,409
Decrease	66,059	13,091		64,938	918	7,193	

The Total Number of all Animals received during the Year 1939 was 8,901,173, as compared with 8,970,424 during the Year 1938, a Decrease of 69,251 head of live stock.

The Total Valuation of all animals received for 1939 was $249,463,937, compared with a Valuation of $256,616,763 for 1938, a Decrease of $7,152,826.00.

During the year 1939, $2,500,000 Indiana Harbor Belt R. R. Co. 4% bonds, pledged with the Trustee of the Company's Mortgage to secure its bonds due April 1st, 1940 and carried on the Company's books at $50,000, were sold for $2,675,000. The proceeds of the sale were deposited with the Trustee under the Mortgage. The Company also continued the plan of setting aside in irrevocable trust not less

than $1,215,000 in each of the years 1937 to 1939, inclusive, to retire its bonds. The amount so set aside in 1939 was $1,715,000, making a total set aside to date of $4,145,000, as appears from the annexed balance sheet.

The period for which the Company was organized to carry on business expires by limitation on July 10th, 1940. After July 10th, 1940, the Company will continue as a corporation for the purpose of liquidating its affairs and dividing its capital, but not for the purpose of continuing the business for which it was established.

By order of the Board of Directors.

FREDERICK H. PRINCE,
President.

THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY

BALANCE SHEET DECEMBER 31ST, 1939

ASSETS.

Investment Account:		
132,000 Shares Capital Stock of the Union Stock Yard and Transit Co., 55,000 Shares Capital Stock of the Chicago Junction Railway Co., and other investments		$28,384,736.92
Interest and accounts receivable:		611,184.04
Cash at bankers:		
Cash in Banks	$2,064,497.10	
Collateral Trust Gold Bonds (due 1915), Coupon Account	122.92	
Mortgage and Collateral Trust Refunding Gold Bonds, Coupon Account	8,305.00	
Cash on hand—New York Office	14.00	2,072,939.02

Bond retirement fund:		
Guaranty Trust Co.—New York	$4,145,000.00	
Guaranty Trust Co.—New York (Realized from Sale of Collateral)	2,675,000.00	6,820,000.00
		$37,888,859.98

LIABILITIES.

Capital stock:		
65,000 shares preferred, par $100	$6,500,000.00	
65,000 shares common, par $100	6,500,000.00	
		$13,000,000.00
Four per cent. forty year mortgage and collateral trust refunding gold bonds (deed of trust dated April 10, 1900) $10,000,000 issued at 5% under supplemental Trust Deed, dated April 1, 1915		14,000,000.00
Interest accrued on mortgage and collateral trust refunding gold bonds		165,000.00
Unpaid dividend vouchers		43.00
Unpaid coupons		8,430.000
Taxes payable		18,824.38
Reserve:		
Bond retirement		4,145,000.00
Surplus		6,551,175.00
		$37,888,859.98

CONTINGENT LIABILITIES.

Bonds guaranteed as to principal and interest:	
Chicago Junction Railroad Co., 4% Bonds (due March 1, 1945)	$2,327,000.00

This Balance Sheet does not contain any provision for 1939 Federal Income Taxes.

AUDITOR'S CERTIFICATE.

We have audited the Accounts of The Chicago Junction Railways and Union Stock Yards Company for the year ended December 31st, 1939, and hereby certify that, in our opinion, the above Balance Sheet, with accompanying comment, correctly sets forth the financial position of the Company, as at December 31st, 1939.

MARTIN, JOHNSON & Co.
Certified Public Accountants,
Chicago, Illinois.

[Title omitted.]

REPORTER'S MINUTES

[Filed July 30, 1940.]

Hearing at Hearing Room No. 2, Internal Revenue Building, Washington, D. C., on the 18th day of July, 1940, at 10:00 o'clock A.M.

The above-entitled proceeding came on for hearing on this the 18th day of July, 1940, before the Honorable Charles P. Smith, the Honorable John W. Kern, and the Honorable Clarence V. Opper, Members of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had and testimony heard, to wit:

Appearances:

Joseph N. Welch, Esq., Edward J. Keelan, Esq., Lawrence E. Green, Esq. (Hale & Dorr, 60 State Street, Boston, Mass.)

Joseph K. Moyer, Esq. (1343 H Street, N.W., Washington, D. C.), and

Francis B. Keeney, Esq. (Swan, Keeney & Smith, 1310 Turks Head Building, Providence, R. I.)

appearing on behalf of the Petitioner.

Stanley B. Pierson, Esq., and Philip M. Clark, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

PROCEEDINGS

The Clerk: The Honorable Charles P. Smith, the Honorable John W. Kern, and the Honorable Clarence V. Opper, presiding in Docket No. 83797, the Chicago Stock Yards Company.

For the Petitioner, Mr. Joseph N. Welch, Mr. Joseph K. Moyer, Francis B. Keeney, Edward J. Keelan, Jr., and Lawrence E. Green.

For the Respondent, Mr. Philip M. Clark and Stanley B. Pierson.

Member Smith. I would like to ask first, what is your intention with respect to this motion for further hearing?

Mr. Welch: That is the motion which I wish to argue first, if Your Honor please, and we will deal with the other motions at the conclusion of my argument on that motion. And also at the outset I am presenting with Your Honor's permission, a motion for leave to file an additional affidavit of James A. McDonough.

Your Honors will all remember that there was an affidavit in the file in connection with the motion for a re-hearing, and further re-hearing, the purport of the additional affidavit being simply to bring the liquidation of the Jersey Company up to date, and to show that as of today it actually is in liquidation, and has ceased to do business.

The affidavit was drawn at the last possible moment to show as much as we could in the development of that liquidation, and a copy of it was furnished to the government counsel two or three days ago. I have the original motion here, and I have several printed copies of the affidavit.

I would like to present the motion, and it is my hope that we may have leave to file the additional affidavit at this time, and I am not sure that it is opposed by government counsel.

Member Smith: Is there any objection to the affidavit being received?

Mr. Clark: I merely want to state that I understand this is purely supplementary to what already has been filed, and

of course its consideration would be in conjunction with what has already been offered.

Member Smith: That is with respect to which motion?

Mr. Welch: The motion for re-hearing, and further hearing, that is the heading that it has on it. I have printed only the affidavit that is attached to the motion, since that is the only thing that is of importance.

I will say with respect to the affidavit, this additional affidavit, that while it is not long, the substance of it is, as I have stated, that it shows that the Jersey Company now is in liquidation, that eight days ago it ceased to do business, and that its Directors are now Trustees merely for the purpose of winding up its affairs and distributing its assets.

Mr. Green thinks that perhaps there was a misunderstanding.

Member Smith: How much time would you suggest that you would like to take?

Mr. Welch: I think that I have the reputation of being moderately brief. My guess is that I will not be more than an hour. I would hope to be somewhat less, but I should think that I would be an hour.

Member Smith: You may have that time.

Mr. Clark: May I ask if that has reference to your argument on this one motion?

Mr. Welch: That is my total time.

Mr. Green suggests to me that there may have been a faint misunderstanding between you and me as to what motion I am arguing first. I am arguing first the motion that has on its cover the "Motion for Rehearsing and Further Hearing," to which the McDonough affidavit is attached. I am arguing that the case should be reopened merely to the extent of hearing the new evidence developed

since the original trial, in respect to the fact that the Jersey Company is now being liquidated.

I don't think it is necessary for me to say that the new evidence which the petitioner seeks to introduce is important evidence. It was the petitioner's case throughout the long trial that its gains and profits were permitted to accumulate for the purpose of liquidating the Jersey Company when its charter expired in 1940. Of course, as we tried the case in this court room we could only talk about plans and hopes. Now that the liquidation has become a reality, and is in fact substantially and practically accomplished, certainly no words of mine are necessary to show that the evidence we seek to introduce is important.

It seems to me that it is not only important but almost decisive because if this Board would find now, as I think it must when this evidence is introduced, "Yes, it is now clear to us that it was always the intent to liquidate the Jersey Company, and it is now clear to us that gains and profits were accumulated for that purpose," then it seems to me that the gravest consideration must be given anew to the case as a whole.

Now, it is not my purpose to stand here and discuss the law of these cases. It is so much more familiar to Your Honors than it is to me, that it would be just silly and stupid to talk about it. To some extent Your Honors have made or at least developed the law. The law is very simple. If I am the only stockholder in a corporation and I allow its gains and profits to accumulate to avoid the imposition of the surtax, this tax is owed, and on the other hand, if I am the only stockholder of a corporation and I allow its gains and profits to accumulate for some other purpose, this tax is not owed. That, of course, is just how simple it is.

The Act, as we know, is implemented with two presumptions, the presumption that arises from the mere

holding company or the presumption that arises from permitting its gains and profits to accumulate beyond its reasonable needs, but as the courts have said, and as Your Honors have said, those presumptions are implements to the enforcement of the statute and whenever a taxpayer reaches the court room those presumptions are designed to make the taxpayer show his hand, as we all know has been said, and I have liked the fact that always in these cases when the taxpayer has come in and shown his hand and particularly when there is a long and extended record, I have liked the fact that the Board has always said: "We wish to go to the deeper question; we wish to know what the real purpose was."

I will, however, mention to Your Honors the Trico Securities Case, which was very recently decided, February 23, which to some extent reviewed prior cases of the Board. That was a case not dissimilar to this case, as no case can be very dissimilar, and in that case one of the presumptions, the presumption that arises from a mere holding company, was found to exist in one of the years in question. In that case there was a large surplus. In that case, large surtaxes were in fact avoided. In that case there were loans by the corporation to its stockholders, but this Board found that the real purpose that dominated the conduct of that concern was the purpose of maintaining a market in Trico stock, and when the Board looked through the whole thing and saw that purpose clearly there, all of these other things that I have mentioned were all brushed away—a big surplus, loans to stockholders, year-end tax sales by stockholders of the corporation, everything was of course brushed away when the Board could see there gleaming and pure and white the intention, not to prevent the surtax, but the intention to maintain a market in Trico stock.

Now, in the case that we are considering here, in a trial that lasted some two weeks, I on my part devoted all of my efforts to an honest and earnest attempt to show the purpose. There was, of course, almost an appalling mass of documents, schedules and tax returns and corporate charters, and Heaven knows what, put in evidence.

There was a stipulation, and my sympathy goes out to the Chairman of this Division as I think of him plowing through all of those papers, but on the whole I as the trial lawyer had scant interest in all of that bulk, because I knew that this Board would go to what you have called the deeper purpose, and I tried through the witnesses that I put on the stand and through cross examination of the Government's witnesses, to develop this one simple thing, and that was that for something over a quarter of a century it had been the purpose of this petitioner to liquidate the Jersey Company when its charter expired on July 10, 1940.

Member Opper: May I interrupt you, Mr. Welch, to ask you how much importance you attach to that specific date, July 10, 1940?

Mr. Welch: Well, as my argument develops, you will find that I attach less importance to that date than some of the Government witnesses, because the Government witnesses, at least one, believed the Jersey Company should be liquidated prior to 1940 if possible, and I shall call Your Honors' attention to his testimony. I attach significance to the date of the expiration of the Jersey charter because that was the date on which the charter did expire.

Member Opper: You would not say it was a fair statement of the claimed intention of the petitioner to liquidate the Jersey Company as soon as possible?

Mr. Welch: There was no testimony from the petitioner's witnesses that it should be liquidated prior to that date.

Member Opper: I am trying to find out your interpretation that you place on the testimony to see whether it really comes down to the question that you place great importance on the date of July 10, 1940, as being the date to which they were directing their attention?

Mr. Welch: I think it was of extreme importance, because when that date arose, there was what all of us in the court room repeatedly called "the 1940 crisis," something then to be done. The Jersey bonds were due, the corporate charter came to an end, you could not just gaily go by that date, something dramatic had to happen to the Jersey Company on July 10, 1940. There was no escape, that is why I say that the date was important. It was an absolute landmark when a half century of corporate existence came to an end, when the $14,000,000 of bonds became due, and when something of the most drastic nature had to be done.

Member Opper: Including the possibility, presumably, that the existence of the corporation might be extended?

Mr. Welch: That was a possibility which was canvassed in this court room but I am very happy to be able to say to Your Honor that no single witness either Government or petitioner, entertained for a moment the idea that it would be wise to extend the Jersey charter.

I shall call your attention in a moment to the testimony, and everybody was agreed that the part of wisdom lay in liquidating the Jersey Company, and I am sure that Your Honor will have some interest in those statements as I come along to them.

Now, because I can do it very swiftly, I would like at this point to call Your Honors' attention to just a few of the high spots in the testimony where this intention to liquidate the Jersey Company, and the intention to ac-

cumulate or the purpose of accumulating gains and profits to achieve that liquidation is made clear.

What I shall read is in each instance a very short statement, and they will, I trust, be of some interest to you. I think that the most natural man to turn to first would be Mr. Prince. He stated on page 424 of the record what his position was. At the bottom of 423 I put to Mr. Prince this question:

"Q. Mr. Prince, I have just got one other question to ask you: Will you tell us what your purpose was in accumulating funds in the Maine Company, as you have done?

And he answered:

"A. Why, sir, I recognized, as a man that had many years experience in finance, the obligations that I had before me to pay in 1939 and 1940. I kept that continually before me.

"I recognized the responsibility that I had, that in carrying on that industry and the association I had with the men who had been with me all my life, to see that nothing happened to it. I used the best judgment I could to be conservative. Through all the troubles that we have had and the uncertainty, I tried to hold my ship to its course.

"Whether I have done so or not—"

And the old man—he is very old, eighty, sort of hesitated and I thought he was going to break down at that point, and I cut off his examination, and turned him over to my brother for cross examination.

Now, on page 425, on cross examination, my brother said to him:

"You have spoken about your concern as to the 1940 liability. What do you mean by that?

"A. Well, there would be practically $28,000,000 would have to be raised, in 1940.

"Q. For what reason?

"A. Why, to pay off the $14,000,000 bonds that were due; to pay six million and a half of preferred stock; to pay three millions of bonds on the Central Manufacturing and to pay our guarantee on the Elevated bonds, I think it was $2,600,000, if I remember rightly."

Member Smith: Are you contending that at the date of the organization of the Maine Corporation, Mr. Prince and the others associated with him had the purpose that you refer to?

Mr. Welch: I claim, if Your Honor please, that the purpose was formed either at that time, or almost immediately after, Mr. Prince testified that when Mr. Armour was a stockholder in the Maine Company, he and Mr. Armour decided that when 1940 came around they would liquidate.

Member Smith: But you are not making any contention that the Maine Corporation was organized simply for the purpose of facilitating or bringing about the liquidation of the Jersey Company, are you?

Mr. Welch: I will say that the Maine Company was organized with a view to some day owning this enterprise, and that the ink was not dry on its corporate charter until its managers went out to acquire Jersey common, and strengthen their position slowly and steadily through the years so that when 1940 came this useless Jersey Company could be gotten out of this picture, and the enterprise headed, as it has in fact actually for years been headed by the Maine Company.

Member Smith: Do I understand you to mean by that, that it was the thought of Mr. Prince and Mr. Armour at the time of the organization of the Maine Company, that

this would be a means by which they could get control of the Jersey Company, and own it in its entirety?

Mr. Welch: I would go further. It was a means by which they intended ultimately that the Maine Company should actually be the owner of the stockyards enterprise as a whole. There is no doubt about that.

Member Smith: That is what I gather from the testimony of Mr. Prince on page 413 of the record. The question was asked him:

"Q. Now, Mr. Prince, after the Maine Company was formed, did you make some plan about what you wanted to do with the Jersey Company in 1940?

"A. Yes. Mr. Armour and I talked the matter over, and we realized that in 1940, that it would be advisable to liquidate the Jersey Company for two reasons.

"In the first place, when the New Jersey Company was formed, there was no means of raising any new capital. It was a difficult—you couldn't increase your stock, and so it was a difficult thing for the necessities of the yard to raise any new capital.

"In the second place, there was a very large saving to be made in liquidating the New Jersey Company. And then I called Mr. Armour's attention to that, and he joined me, and I brought up all the stock of the New Jersey Company that I could, every single share."

Mr. Welch: You are correct, and then one other little excerpt from the cross examination, on page 427, my brother said, speaking of 1940.

"Q. You would have expected to reorganize, wouldn't you?

"A. I wouldn't have reorganized, you understand:

I expected to liquidate the company. That is what Mr. Armour and I decided on."

Now, I won't dwell on Mr. Prince's testimony because if I were sitting where you gentlemen are, and I heard only the principal officer of a taxpayer testify, I think that I should say, unless I was enormously impressed by his demeanor, I think that I should say, I would like to see some corroboration of that before I am convinced.

Your Honors have often said that the testimony is impressive and to be considered if it is corroborated but just standing alone I think as I say in all honesty if I sat where you men sit I would want to hear more than that, so that I don't say too much, as I stand here, about Mr. Prince's testimony.

Member Smith: Right at this point, may I ask, if it be the intention of the Maine Company to liquidate the Jersey Company, why was there any necessity for the Maine Company to acquire the shares of stock of the Jersey Corporation?

Mr. Welch: Well, there were two possibilities for the Maine Company, they seem to be quite clear. In the first place under this 9 per cent guarantee with the earnings of the Jersey Company in excess of 9 per cent going to the Maine Company, with which Your Honors are all familiar, with that contract in force, the Maine Company might have sat there until 1940 and let the income flow in, and been very grateful for it, and do what you might call the hit and run, gather in no more stock, buy no common and buy no preferred, just take those earnings and as I said, be grateful for them, and let 1940 come around.

Now, had it done that, when 1940 came around, every unit of this enterprise below the level of the Maine Company would have been substantially busted as is the fact

today, the Jersey Company would have been without funds because all of its earnings except what the 9 per cent that went to the stockholders were swept up and properly so to the Maine Company, the Transit company and the Railway company, their earnings were swept up to the Maine Company, and so when 1940 arrived, if the Maine Company had played what I call the hit and run game, it could have enjoyed a delightful income but when 1940 came no company below the level of the Maine Company could have done anything about paying the debts or reorganizing or anything of that sort, and the Maine Company would just have disappeared. It was not a stockholder to any large extent, it simply had this contract which gave it the earnings above 9 per cent and the Maine Company would just have had no position, it would have had to just say goodbye to what has been a happy and pleasant existence.

The other alternative, and it seems to me the one that would appeal to any businessman, was to see quickly that when 1940 came, if the earnings were to be swept up to the Maine Company, as they had to be, then the Maine Company must do two things, if it didn't want to play hit and run. It must accumulate stock of the Jersey Company so that it could determine its destiny when 1940 came. It must have some position there other than this mere contractual one, to get a share of its earnings. It must become a stockholder, and the more stock it owned the better.

Member Opper: What about the third alternative?

Mr. Welch: Could I finish and then could I answer?

Not only must it become a stockholder but it must take good care that it has in its treasury sufficient funds so that it can take care of the Jersey bonds and all of the indebtedness, and not run the risk of having this thing taken away from it when 1940 arose.

Now, if Your Honor please, could I have your question?

Member Opper: I said, what about the third alternative?

Mr. Welch: What is that?

Member Opper: Suppose that your broom swept a little bit harder and while it was sweeping these dividends from one stockholder to another, it had continued to sweep and swept the dividend from the Maine Company to its stockholders?

Mr. Welch: Certainly if the Maine Company had been playing a hit and run game that is exactly what it would have done.

Member Opper: And suppose then that Mr. Prince had this money which the Maine Company now has, would he be any worse off from the standpoint of buying up this stock in his own name than the Maine Company would be, or than he would be as the purported agent for the Maine Company?

Mr. Welch: Your Honor is thinking of what Mr. Justice Brandeis has said?

Member Opper: I admit I didn't think of the idea.

Mr. Welch: Now let me answer that for you, if I may. Mr. Prince has got to make this decision:

At or about 1911, 29 years away from 1940, if he thought what Your Honor is thinking, he must have said to himself: I will be 80 years old, if I am lucky, but I know enough to know that I am very apt to be in Heaven or some other place. There is no sense in my saying that I will sweep it all up and put the bills in a safe deposit box somewhere to meet this 1940 crisis, because I will be dead by then in all probability and somebody will have to deal with my executors or my trustees, and he might even have thought, as I would have told him to think had he come to me for advice, I might have said to him, Mr. Prince, for all I

know you may be in an insane asylum in 1940. I regret to say I have had some clients who have had to go to an insane asylum, and when 1940 comes around, if you are in the bughouse somewhere it won't do you any good to have a safe deposit box full of bills, and had he asked me what to do I would have said, Well, now, Mr. Prince, I think the simple and the safe thing is to leave the funds in the Maine Company where you know where they are, and I would advise you as your lawyer to take down some gorgeous dividend like $400,000 a year. Mr. Prince, if you could tell me how in Heaven's name you need any more to have a wonderful life, I might listen to you, but I suggest you take down $400,000, and if that won't let you and your wife live gorgeously, well take down a little more, I won't care, but don't you run the risk that you will be dead when 1940 comes and don't you run the risk that you will be in some bughouse. Whatever you don't need to have a lovely scale of living, leave right in the Maine Company, and then I will know where you stand.

Member Opper: Suppose the Maine Company had all of its money in cash and Mr. Prince was in the bughouse, who would the Maine Company be?

Mr. Welch: The Maine Company would be the Maine Company, you can't change it. The beauty of the Maine Company is that it exists forever. It is free of the risk of death, and free of the risk of insanity.

Member Opper: Are you suggesting in trying to prove the purpose of this petitioner, you are really doing anything but proving Mr. Prince's purpose?

Mr. Welch: Well, how can a corporation, if Your Honor please, have any purpose?

Member Opper: That is what I am asking you, so if Mr. Prince was in the bughouse, whose purpose would the Maine Company's purpose be?

Mr. Welch: Now, it seems to me that we are confusing two different things. I am talking about the purpose in accumulating the funds in the Maine Company, and I am saying to Mr. Prince back in 1911 that had better be your purpose, when 1940 gets here you may be crazy or dead and can't have any purpose or can't act, but your purpose all through these years had better be to put that money where it can be found when this long distant thing comes around. I don't know what will happen to your personal fortune, I can imagine creditors attacking you, and you have some immense court claim against you, and Mr. Prince had he seen me in 1911 would have told me that he operated a yacht and I could imagine his yacht sinking a liner, for example and having a most colossal court liability arise on Mr. Prince as an individual.

Member Opper: But you are suggesting that Mr. Prince's interest in this impersonal entity, the Maine Company, was so great that if the creditor had come along and attached his personal fortune and presumably his holdings in the Maine Company, that Mr. Prince would still have been interested in this impersonal enterprise continuing even though he and his family had lost all of their holdings in it.

Mr. Welch: Certainly the attaching creditor that you speak of, suppose that Mr. Prince's yacht had sunk the liner and the immense liability had arisen and the attaching creditor would have got his stock in the Maine Company, that is what he would have got and I think that his counsel would have said to him, as I would have said to that attaching creditor, "I certainly congratulate you, and now that you have got that stock, if you have got any sense you will do just what Mr. Prince has been doing, you will be saving up your income so that when the 1940 crisis arrives you can do something about it.

Now I want to turn to just two or three other places in the record where this intention of Mr. Prince was testified to. I am now turning to page 320 where Mr. McDonough testified, and now my question to Mr. McDonough was—I am taking this up quickly:

"*Q.* Will you tell us the substance of what was said by him at that time?

"*A.* In my own words, or—

"*Q.* Oh, yes.

"*A.* 'Mr. McDonough' he said (this is quoting Mr. Prince) 'Mr. McDonough, I am delighted that you arrived at this form of report, and I hope that you will keep it constantly before you and keep it up to date, as nearly as you can, because I want to accumulate all of the cash that I can between now and 1940 to meet a very large obligation that is ahead of me, and I want to know what my cash position is from day to day, if possible, and I want you to keep me so advised.' "

Mr. Leonard, at page 109, had something to say about Mr. Prince's intention, and I won't even pick up the question because his answer is so clear. I am reading only his answer on that page, on page 109, it is near the top, if your Honor please. Mr. Leonard said:

"Well, I was urging upon Mr. Prince the serious necessity—"

I think that I must interrupt—perhaps the two Members other than the Chairman ought to be told that Mr. Leonard ran the Transit Company in Chicago which operates the stockyards.

Member Smith: He was president of it?

Mr. Welch: Yes, and the operating man out there, and now I will read again. This is Mr. Leonard:

"*A.* Well, I was urging upon Mr. Prince the serious necessity of building fire-proof hog houses, and fire-proof sheep house, and Mr. Prince said: 'Well, Mr. Leonard, why, I cannot possibly let you have any such sum of money as that now. I have got a very, very large sum of money to raise to pay off the indebtedness of 1940. I know that you would like to have the hog houses; I am perfectly willing to have you have them, but until after 1940, nothing doing.'"

And on the next page he is talking in the middle of page 110, Mr. Leonard is talking about another conversation, in which while I won't read it in the earlier questions and answers he is complaining to Mr. Prince that he is niggardly about the Transit Company, that he skins it out of money too much, and Mr. Prince said to Mr. Leonard:

"I know that you feel that I am skinning all the money from you, and not giving you what you would like to have, but until this indebtedness is paid—in short, that was the burden of his song—he must pay this indebtedness in 1940."

Member Smith: Mr. Welch, it is true, is it not, that if Mr. Prince or the Maine Company had used the funds it had accumulated up to 1929 to acquire bonds or save up to pay them off, he would have had his $14,000,000 all paid off by 1929, wouldn't he?

Mr. Welch: Yes, it was developed at the trial, and some of the Government experts took the view that Mr. Prince should have bought Jersey Company bonds all the way along, and I rather sympathize with that view. I think that that would have been a perfectly reasonable thing to do, but Mr. Prince's position was that he thought the critical thing was the Jersey common, and I have great sympathy with that. As to the preferred, which by the way,

is a voting stock, votes equally with the common, being a very wise old man he always bore in mind that the preferred stock could be retired at 105 when 1940 came around, or at par, so that I somewhat think that it would have been the part of wisdom to have accumulated Jersey Company bonds but Mr. Prince testified that it was his impression that they were not particularly available on the market, and one reason I think it would have been a good idea was that if they had used the cash in the Maine Company that attracted the attention of the Revenue Agent and the Commissioner to buy Jersey bonds I think perhaps this case would never have arisen, certainly I know this, and how simple it was, if Mr. Prince had allowed the earnings to remain in the Jersey Company, which was in his full power, mind you, the excess earnings over nine per cent, if he had not sucked them up under his contract, and allowed the Jersey Company to acquire $14,000,000 to pay its indebtedness in 1940 it would not have attracted the slightest attention or criticism, and that is one thing that I find very moving to me. I can't imagine a man having this intent, this nefarious intent, as we call it, I can't imagine him sucking all of that money up into the Maine Company where it sticks out like a sore thumb, when the simple thing to do, if he had anything like that in mind, was just to let the money pile up in the Jersey Company and he could have tucked away $14,000,000 in the Jersey Company to have paid its bonds in 1940 and nobody could have been in any sense critical of it.

Member Opper: It is a fact, isn't it, that some of this money, I suppose what might be characterized as a considerable amount, was used for the purchase of Jersey common?

Mr. Welch: Oh, yes, indeed.

Member Opper: Now, the position with respect to the

Maine Company, and Mr. Prince and the Jersey common, was, as I understood you earlier, something quite different from what would have happened if the company had been buying up its own bond obligations, that is, since the Maine Company was not a heavy stockholder of Jersey, neither the Maine Company nor Mr. Prince could have controlled the Jersey Company, is that right?

Mr. Welch: That is right.

Member Opper: Now, is that a reason why Mr. Prince chose to use money to buy up Jersey Common?

Mr. Welch: I think it is. He so testified.

Member Opper: And what was the history of the purchase of that Jersey common? Can you refresh your mind on that very briefly? I mean beginning in 1911, and going through to say 1930, the purchase was larger in the earlier years, wasn't it?

Mr. Welch: Yes.

Member Smith: Right at this point, may I state that Exhibit S-59 shows that the Maine Company made its first purchase of Jersey Company common stock in 1913, and it purchased 100 shares at $65,000 or at $650 a share and it is stated in a footnote on the exhibit that that did not represent the fair market price.

The next time that the Maine Company purchased any of the Jersey Company stock was in 1918 when it acquired 17,929 shares from F. H. Prince & Company.

Mr. Welch: Oh, indeed, but Your Honor in that is forgetting that the F. H. Prince & Company acquired that huge block of shares, as the agent, so to speak, of the Maine Company, and the idea was to accumulate the stock and pass it on to the Maine Company, as was done, and indeed Mr. Prince thought it so essential for the purposes of the Maine

Company, that he lent the Maine Company some $3,000,000 to enable those purchases to be made.

Member Opper: That was five years after this presumable plan or six years after this plan or seven years after this plan, presumably was created, is that right?

Mr. Welch: Yes, but you see

Member Opper: What had been happening in the meantime, when stock was to be acquired for this ultimate purpose that you are talking about, including as I understand it, the very significant important matter of control of the Jersey Company by Prince in the Maine Company?

What had been happening in fact about the acquisition of this stock, that is to say, who had been acquiring it? Was it the Maine Company, or was it Prince?

Mr. Welch: The answer to that is so simple, and so beautiful, it was acquired by F. H. Prince & Company, but the reason it was acquired by that company was that the Maine Company just did not have the funds to do it with.

Member Opper: So that if this awful thing that Mr. Prince was afraid of had happened, any time during those seven years, if he had died, or if his yacht had run into something, this stock would have been a part of his estate, is that right, during those seven years, and it was not until after the passage of the income tax law, and the surtax, that this thing happened, is that right?

Mr. Welch: Just a moment.

Mr. Green reminds me that the Maine Company acquired really huge blocks of Jersey Company stock from the very outset, exchanging its own bonds for the Jersey common, so that the acquisition of Jersey stock by the Maine Company began on its formation and continued from that day to this.

The only way that the Maine Company could itself acquire the stock in the early years was by issuing its bonds and it acquired some 30,000 shares within a year or two after its formation.

Member Opper: It is a fact, isn't it, that in 1918 Prince had $3,000,000 odd worth of this stock?

Mr. Welch: That is true.

Member Smith: That stock was owned outright by Mr. Prince up to the time that he turned it over to the Maine Corporation?

Mr. Welch: It was owned in the sense that he had possession of it, that is true.

Member Smith: He was under no legal obligation to turn it over to the Maine Company?

Mr. Welch: I am inclined to think that he was: I am not entirely sure that the record may be clear on that point.

Member Smith: There is nothing in the record that I could find to show that he was under any legal obligation whatever to turn that stock over to the Maine Corporation.

Mr. Welch: Certainly the place where it belonged in the last analysis was in the Maine Company, but because the Maine Company had this 30,000 shares of Jersey common which it had issued for bonds, and any man of any sense would have seen what we might call the Prince block in the early years to be added to that to strengthen the position of the Maine Company and let that control the destiny of the Jersey Company when 1940 arose.

Member Opper: You are not suggesting, are you, Mr. Welch, that if Prince had owned a certain number of shares, and the Maine Company had owned a certain number of shares, that any question would have been raised as to the control to be exercised by that joint block, because

part of it was owned by Prince and part was owned by the Maine Company.

Mr. Welch: Oh, I am in perfect agreement with Your Honor. There is no slightest doubt that Mr. Prince intended that the two blocks should be amalgamated and they were amalgamated. Anyone in his senses would have intended that.

Member Opper: No, what I mean to say was that if there had never been any transfer of book title to these securities from Prince to the Maine Company, any question of control would have been affected by that.

Mr. Welch: Not except as I think Your Honor will agree it is much better to have them in the Maine Company, and when Your Honor points out the risks involved in the earlier years, I agree that the risks were there but to a much less extent, because Mr. Prince was a very much younger man, and a very active man in those years.

Member Opper: Isn't it a fact that what we have got to do, assuming that there was that third alternative, if Prince himself could have allowed the dividend to be paid and that he could have acquired the stock, that then we have got to go back and find out which one of those purposes he actually had in those earlier years, to find out whether it made any difference to him, or whether he did not intend in fact a large amount of this stock to be bought in his own name for his own purposes until it came to the time it was evident that he could save income taxes by having this stock purchased by the Maine Company, and the failure to declare dividends—

Mr. Welch: When Your Honor says we have got to go back and explore this third alternative, I think that you have just got one place to go back to, and that is to the record, and there wasn't any witness that took this stand in

the court room, Government or otherwise, who had anything to say in favor of that alternative.

Member Opper: I am not talking about this question of whether it was a reasonable business purpose or whether there was anything theoretical about it. I am talking about just a question, supposedly a question of fact, that is, what was the state of Prince's mind, what is there in the record on that, as to which of these possible alternatives he might have had in mind assuming that if he accepted the fact that he wanted to acquire the control of Jersey Company—

Mr. Welch: I think the simple answer is, if Your Honor please, that the record is just a blank on it. Nobody said that that was a reasonable alternative. Everybody testified that the reasonable alternative—

Member Opper: You don't deny that there, that that was a reasonable alternative, do you?

Mr. Welch: I certainly do. I have told Your Honor—

Member Opper: Even though Prince himself adopted that plan to some extent by buying the stock in his own name?

Mr. Welch: But he turned it over to the Maine Company as soon as he could.

Member Opper: In 1918.

Mr. Welch: I would substitute for 1918, the words "as soon as the Maine Company was in a financial position to take it."

Member Opper: Oh, now, do you suggest that in 1918, the Maine Company was in a position to pay cash for this?

Mr. Welch: No. As a matter of fact, I now remember that he took the Maine Company's I. O. U. for it.

Member Opper: Which he could have done from the beginning.

Mr. Welch: I suppose that he could. I suppose that practically speaking he had the Maine Company's I. O. U. for

it because if he was buying it for the Maine Company, as I think the record shows that he was, practically speaking, I think that he had their I. O. U., whether it was formal or not.

Member Smith: When you say that it was better for the Maine Corporation to own this stock, how did you mean that it was financially better for the Maine Corporation to own it inasmuch as the Maine Corporation would not have to pay any income tax with respect to the dividends received on the stock, whereas F. H. Prince would?

Mr. Welch: Not at all. I merely meant that when you get it into the Maine Company, which has an enduring life and no risks attached to individuals, you have got it right where it belongs, and now I would like to say to Your Honors, that there seems to me implicit in the questions that have been asked me, it assumes that there was some advantage to Mr. Prince from a tax purpose in turning over the shares to the Maine Company, in 1918.

I wonder—there was something in Your Honor's opinion that seemed to me to indicate that you had in mind—

Member Smith: I don't see how it can be denied.

Mr. Welch: How simple it is, Mr. Green I think somewhere has the figures on that. I can show them. Would Your Honor delay just a moment?

I would like to have Mr. Green answer that. He has worked the figures out and I have not.

Mr. Green: I worked the figures out and gave them to Mr. Welch, and I think it is a very easy matter to develop. According to the petitioner's exhibit attached to the stipulation, S-59, Mr. Prince turned over—

Mr. Clark: May I ask indulgence for just a minute until we find that?

Member Smith: We will take a five minute recess.

(Whereupon there was a recess.)

Mr. Green: I think what we are discussing has a bearing on a paragraph in your opinion, I am reading from page 33 of the printed pamphlet form of opinion, I haven't it in any other form, at the bottom of page 33 of the opinion it was stated:

> "The evidence shows that the petitioner was availed of by Prince for the purpose of reducing his own tax liabilities. Over a number of years Prince had accumulated more than 17,000 shares of Jersey Co. common stock upon which he was receiving an annual dividend of $9 per share. These were his own shares of stock. The dividends on them were taxable to him. In 1918 he transferred all of those shares of stock to the petitioner at cost and was thereafter relieved from the payment of surtax upon the dividends thereon."

Now, that statement, that last statement, in the last sentence is correct as far as it goes, but with all due respect to Your Honors, I don't believe it goes far enough and has all of the facts in it.

If you will refer to Exhibit S-59 attached to the stipulation, you will find the exact number of Jersey common shares which Mr. Prince turned over to the Maine Company in 1918, which was 17,929, and the exact price for the shares, which was $3,190,339.96.

Now, when Mr. Prince turned those shares over to the Maine Company, he received from the Maine Company as Mr. Welch expressed it, an I. O. U., from the Maine Company. He received from the Maine Company an I. O. U. for $3,190,339.96, and as Your Honors found in your opinion on page 16—I beg your pardon, on page 12:

> "Upon the petitioner's debts to Prince it paid interest at the rate of 5 percent or more."

So when Mr. Prince turned over these shares he received an I. O. U. upon which he received interest at the rate of 5 per cent or more.

Now let us assume that he received the lowest rate mentioned, namely 5 per cent. He gave up and was relieved from the duty of paying income tax, that is surtax alone because dividends were not then subject to the normal tax, of $9 a share on 17,929 shares. That is, he gave up dividend income amounting to $161,361.

At the same time in exchange for that he received interest income of at least 5 per cent on $3,190,339.96 or $159,516.99. The effect of that transfer was a net decrease of income of $1,834.01, but the dividend income was subject only to the surtax, whereas the interest income was not only subject to the surtax but was also subject to a normal tax which at that time was at the rate of 12 per cent, so that he paid substantially $20,000 more in taxes as a result of transferring that stock to the Maine Company, and receiving the Maine Company's I. O. U. in place of it. That is $20,000 a year more in income taxes.

Member Smith: That situation would obtain only so long as the indebtedness remained.

Mr. Green: But the minute the Maine Company indebtedness was outstanding, it is only fair to assume that the money which was received from the Maine Company was put to good use by Mr. Prince for extinguished obligations on which he was paying something so that I don't think it can be fairly said that that was done by Mr. Prince to save taxes, or in effect did save taxes, in fact it increased them.

Mr. Welch: I don't think I need to remark, if Your Honor please, that the questions from the bench, which I very much welcome, tend to extend my guess as to how long I might take.

Now, I was about to read another excerpt from the evidence, just a few lines, where Mr. Prince again talked about what his intent was. This is in the testimony of Mr. Reimers, a witness for the petitioner, on page 288 and I am breaking right in because I know Your Honors can follow me. He is talking on page 288 of a conversation that he had with Mr. Prince at the time when Mr. Reimers was telling Mr. Prince that he ought to save the Chicago banks and that if it took $10,000,000 to do it, he could not afford to let the banks go down, and Mr. Prince was resisting him, saying that he didn't want so much money to go out of the enterprise, and particularly out of the Maine Company, if he could possibly avoid it, and Mr. Reimers was saying, You have got no choice, you can't let the banks go down, and in the course of that conversation, I am now reading from the record, "He asked me," that means Mr. Prince asked the witness,

> "He asked me if I was familiar in any way with the different companies. I told him I was not, and I was not at that time. He explained to me the names of the different companies, what his plans were, and what he was striving to do. And I recall particularly that he drew attention to his plan to accumulate cash sufficient to retire debts of the companies in 1940, and that in whatever plan I might work, to please try and avoid calling upon that fund, if I could. And that same conversation was repeated in New York."

Now, just one more place in the record, and I am only selecting places that can be read very shortly, there are a few lines in Mr. Walker's statement, or testimony, appearing on page 631, they are very obscure and I can understand their being missed by the Board because Mr. Walker was called as an expert by the petitioner to put his stamp of approval as an expert upon the conduct of this business.

but it so happened that he was personally acquainted with Mr. Prince, and Mr. Prince had talked to him about his plans and so he is asked to tell that conversation.

"*Q.* Will you tell His Honor what, if anything, Mr. Prince has said to you about what his plans were?

"*A.* Well, there is no question that his plan was to liquidate the Jersey Company. He has told me many times that his theory was to get rid of the intermediate company, that he wanted to hold onto cash, particularly in the last seven or eight years, because he was very fearful—frankly, I felt he was too blue on that point—but he said, 'No, I am going to hold onto cash, and I am going to keep cash as near as I can in one pocket, because then I am going to know where that cash is.' He was always worried about the possibility of bank trouble, and he was just going to keep his cash in as strong a bank as he knew how to keep it and be conservative, indeed, in the extreme."

Now, I have touched on this testimony, on the intent, because everyone in this room agrees that that is the heart of the case. The purpose for which the funds were accumulated is just the whole case, and I have touched on it because the majority, as I understand it, did not believe this testimony:

I take that, I don't get it so clearly from the majority opinion as I do from the minority, but it appears in the minority opinion in this way:

"These witnesses were entitled to belief and their testimony is credible and in no respect impugned or otherwise weakened either by cross-examination or countervailing testimony." And then again on page 37:

"There is no reason why the Board should be incredulous of the several statements of that continuous purpose. It would be reasonable to infer such a purpose even if there were no direct testimony that it existed. Furthermore, opinion witnesses for both the petitioner and the Government all testified that such a purpose would be reasonable. The only witnesses for the Government were three analysts who, after a study of the history and the probable future, agreed that the liquidation of the Jersey Co. in 1940 was a desirable objective and that it would not be unreasonable to build up a fund to provide for it."

Now, turning to the majority opinion, the disbelief of the witnesses on intent is less clearly stated but I think it is there. On page 35, for example, the majority opinion says:

"Although Prince testified that under his program it was contemplated that the Jersey Co. would be liquidated in 1940; there appears to be no necessity for its liquidation and many reasons why it probably will not be liquidated."

And again at the bottom of that page:

"Although it may be desirable to merge or consolidate the petitioner and the Jersey Co., it seems doubtful whether the Jersey Co. will be liquidated in 1940."

Now, I take it from what the minority said, as well as the majority, that this Board did just disbelieve the testimony that I have read to Your Honors, and that in spite of the fact that it was not assailed on cross-examination or any countervailing testimony put in, and I gather from the majority opinion that one reason that the Board disbelieved the testimony was because they felt that the plan

to liquidate the Jersey Company in 1940 just was not a reasonable plan. It did not seem to the majority to make any sense, for businessmen to have such a plan, and so I think that there is in the majority opinion a sort of combination of disbelief of witnesses, and the thought that the plan is unreasonable anyway.

Now, on the unreasonableness of the plan, and I shall argue shortly that it was far from unreasonable and that every witness agreed that it was reasonable, on the unreasonableness of the plan it does not seem to me that it makes any difference, as long as the plan was actually held. I would like Your Honors to bear with me for just a moment while I put what I consider somewhat a fantastic case to you for consideration.

I would like to have you assume that in these years in question some man, let us call him a crank, went to Mr Prince and said, "Mr. Prince, I see heavy war clouds in Europe, and I have got the most marvelous scheme to prevent war. I have invented a new and devastating weapon that will just stop war, and I have looked over this country and I find that you have a very rich corporation, with a large surplus, and that you are entitled to go into the manufacturing business, and I want to give you my scheme, and I want you to stop declaring dividends, and I want you to pile up your surplus, and get in a position so that this new device of mine that will stop war can be turned out in gigantic quantities at a moment's notice. And then when the war clouds really appear, I am going to go to the aggressor and I am going to say, 'Look what I have got. If you don't stop this war your whole population will be annihilated,' and now, Mr. Prince, I think that I can stop war. Will you stop declaring dividends and build this company up so that I can make this gigantic threat to these aggressors?"

And suppose Mr. Prince fell for this somewhat fantastic thing—incidentally I don't think it is much more fantastic than Henry Ford's Peace Ship was in the last war, but let us assume that Mr. Prince fell, and let us assume that somebody came along and tacked on this tax, and that the case were tried and that in some way it were possible for you to look straight into Mr. Prince's heart and see there clear and white and gleaming this purpose to prevent war.

That is all that there would be to the case, the fact that the purpose would seem to you somewhat unreasonable would make you look with a more critical eye into his heart, I admit, but if you can assume that you can look straight in and see the purpose in there, gleaming and pure and white, the case is over.

Now, will you bear with me while I put another example?

Let us assume that I have a corporation, of which I am the sole stockholder, and that year after year I declare out 100 per cent of its dividends and it has not surplus and no accumulation and year after year the examiner comes around and looks me over and says, "O.K., it looks good to me," and then he comes around in the last year, and I have only declared out 90 per cent, and after he has looked the thing over he says to me, "Well, Mr. Welch, I notice that you made a little change this year, you did not declare out all of your earnings, but you declared practically all."

I say, "That is right."

He says, "Well, that looks all right to me."

And I say, "Well you might be somewhat interested to know why I didn't declare them all out this year. It just happened that when the dividend date came around I was making up my income tax return, and I just happened to notice that if I declared them all out this year, I hit a new bracket in my surtax, and I decided I was paying all the

surtax that I meant to and so I cut that dividend to 90 per cent to save my hitting that last bracket."

And let us assume that the Revenue Agent said: "That is very interesting to me. Would you mind giving me a little affidavit to that effect?" And I said, "Why sure. It is the truth." And I gave him the affidavit.

When he took that affidavit to the Commissioner, it would be the Commissioner's duty to stick me with this 50 per cent tax, and if I came into this court room with all of the lawyers in Christendom and sought to save that tax I could not do so.

In other words, if you have the intention to avoid the imposition of surtax, no matter how silly it is for you to have it or how costly, you run into this gigantic penalty tax, and on the other hand, if you don't have that intention, if when the Board looks into the hearts of these men and sees that that purpose is not there, then the tax is not due.

I would like to put it in that way because it is so fundamental to this case.

Now, what puzzles me, if Your Honor please, is how 12 members of this Board could have found that the purpose to save money, to liquidate the Jersey Company, was unreasonable? Naturally, my witnesses testified that it was a reasonable and laudable purpose, but the curious thing was that when the Government experts took the stand they seized the flag that I had carried, as I put it, on my case, and carried it around themselves, and again I want to make very short references to the record.

I want first to turn to page 1039. That is Dr. Atkins on the stand. He was one of the Government witnesses, and there is the short exchange between me and him, in cross examination, and here is my question:

> "Q. Any director of the Maine Company who planned on liquidating the Jersey Company in 1940 would seem to you a wise director?

"A. On the basis of the facts as I know them now, yes."

Well, let us look at Dr. Friday, you will find him on page 1082, and the curious thing about Dr. Friday is that he is not even on cross examination, he is on direct examination, and I will read from the middle of the page, 1082, when Dr. Friday is giving his opinion on direct and I am beginning in the middle of a long answer:

Dr. Friday said:

"The question that I asked myself at that point was whether at the end of 1929, which is the year just before 1930, the first year with which we are here concerned, there was an accumulation of liquid assets which met the reasonable needs of this business, the reasonable needs, as I gathered, being determined very largely by the fact that in 1940 a large number of these bonds became due, and the evident feeling that has been manifested here that at that time the New Jersey Company should be liquidated.

"I have not found much difference of opinion among any of the witnesses. I have read their testimony on this point, and I am in agreement that it should be liquidated in 1940."

There was only one other witness, an expert, and again he is for the Government, and that is Mr. Merriman, on page 894, and once more, he is not under cross-examination, it is a colloquy with the member who heard the case, and this is short, but is it pointed!

"The Member: Well, now, then, as I understand what you intended to have me understand was that during the years 1930 to 1933 it would have been the part of wisdom for the corporation to have contem

plated the earliest elimination of the New Jersey Company when financial conditions permitted?

"The Witness: Yes, sir.

"The Member: Not to wait until 1940?

"The Witness: Yes, sir.

"The Member: And certainly not to project it beyond 1940?

"The Witness: Yes, sir."

And I think Mr. Sternhagen was almost incredulous and he said:

"The Member: Is that the situation?

"The Witness: That is."

Now, there are the three Government experts coming on the stand to tell us whether or not they thought a plan to liquidate the Jersey Company in 1940 was reasonable, and they all seized the flag and carried it around the court room, and said, "Sure, we are all for it."

Now, in the face of that testimony, I confess that I am disappointed to have the Board say, "We don't believe it will be necessary to liquidate it, and we don't think it will be liquidated, and we don't think it is a reasonable plan."

As I view it, the Board is entitled only to get its ideas from the evidence, and the evidence was simply unanimous. Everybody on both sides said that the Jersey Company should be liquidated.

Now, in a similar vein, on page 31 of the opinion, the majority said, about in the middle, on page 31:

"Clearly, there was no reasonable need for the petitioner to acquire the balance of the common stock and the outstanding preferred shares of the Jersey Co."

Now, that is quite a strong statement.

"Clearly, there was no reasonable need for the peti-

tioner to acquire the balance of the common stock and the outstanding preferred shares of the Jersey Co."

Now, once again, evidence was all the other way, and again I take up only the Government witnesses. They all differ with the Board, or with what the Board says there. I turn for example to Mr. Merriman first, at page 872, and he is now under cross examination by me, and I am having these witnesses, as I often did, assume that they were at a directors' meeting with me and discussing the wisdom of the plans about the Jersey Company.

Now, let us assume that; this is the question:

"Q. Now, let us assume, Mr. Merriman, that we are the board of directors of this company in 1930 and 1933, and we are looking forward to what we are going to do in 1940. You have already told me clearly that the Jersey Company ought to be liquidated.

"A. I think it could be advantageous. I do not think it is essential at all.

"Q. But you think that good business judgment would be to liquidate it, do you not?

"A. Yes, sir.

"Q. And the consequence is that you and I both agree that bonds have got to be paid off; that is 14 millions?

"A. Yes, sir.

"Q. And, say, four or five millions of guaranteed bonds have got to be dealt with in some way.

"A. Yes, sir.

"Q. And we know that this preferred stock has got to be paid, and that is about 6½ million dollars.

"A. Yes.

"Q. And we know that the rest of the common stock

that they have not yet succeeded in getting has got to be dealt with in some way.

"*A.* Yes, sir.

"*Q.* Now, in any man's language, that is a large program; is it not?

"*A.* It is a substantial refinancing program; yes, sir."

Now, for Dr. Atkins' views on accumulating more common and more preferred, I turn to page 990 and 991. On 990 I am breaking into a long answer of his, at the top of the page, I am breaking into an answer, and he says there:

"I find that maturing in 1945, but guaranteed by the New Jersey Company, $2,327,000 of Elevated Railroad bonds, which presumably would demand consideration at that time."

Member Smith: What page is that?

Mr. Welch: Page 990. I will start again:

"I find that maturing in 1945, but guaranteed by the New Jersey Company, $2,327,000 of Elevated Railroad bonds, which presumably would demand consideration at that time. And I also give consideration to some other securities, which might or might not demand consideration, depending on the action taken.

"The New Jersey Company preferred stock of 6½ million, and Maine bonds of approximately 5 outstanding in the hands of the public, amount to $3,200,000. And I also put in a figure in excess of $300,000 to represent the value at the approximate market price of the nine dollar guaranteed common stock of the New Jersey Company in the hands of the public, making a total of $26,850,000 in round figures.

"Now, one of two courses of action, it seems to me, will be possible: One is to continue the New Jersey

Company by procuring a renewal of its charter, which, while obviously not sure at this time, nevertheless seems to me to be a matter which reasonably—a consummation of which might be reasonably contemplated, if it should be desirable."

And then I am skipping to the top of page 991 and taking up just three lines:

"Another possibility would be the elimination of the New Jersey Company and the assumption of its assets and liabilities by the Maine Company."

And then skipping to 994 at the top of the page, the Member said to him: this is at the bottom of 993:

"The Member: Yes, but I am talking about the voluntary substitution of one indebtedness for another. You can only do that when the terms of your new indebtedness could be an improvement on the terms of the old."

And then this cogent statement:

"The Witness: That is true, sir, but here we have a definite date, 1940, when you have no choice in the matter. Your securities mature at that time. You will have to pay them off."

Well, then, I turn lastly to this statement of Dr. Friday, on 1078, and running over onto 1079, and he is on direct examination. He is not even on cross examination, and he is asked to state the reasons which led to his opinion, and he says:

"A. Well, I studied this whole situation with all these figures of income and assets accumulated, and cash accumulated. I have listened to the testimony and read most of it. And it is clear that in trying to ascertain what are the reasonable needs, the thing that seems to be at the very center of the problem is what are the

reasonable needs of the Maine Company, particularly in view of a situation that it has—of these situations that it has confronting it in 1940.

"It has been repeated here over and over that in 1940 the charter of the New Jersey Company expires, the bonds fall due. There are 14 millions of them. There are some $2,327,000 of Railroad bonds that the New Jersey Company guarantees the principal and the interest. They will have to be taken care of, and when the charter expires there are preferred stockholders entitled to receive $6,500,000 upon dissolution or sale or the customary phrase that is contained in the preferred stocks. That Mr. Prince is desirous of retaining control of this whole stock yards situation together with the Chicago Junction Railroad situation, and since because that is the chief source of his income, and of the income of the Maine Company, and since that is true, he naturally concerns himself certainly as an individual with the smooth handling of that management of that situation in 1940 in order that no untoward event may befall these companies or this industry.'"

Now, the Board said that it could not see any reason to acquire any preferred or any common but the Government witnesses saw the most cogent reasons for them, and as I pointed out to Your Honor, they saw it not in cross examination, when they were being led or fooled or anything else, but they stated it clearly as their own opinion.

Now, the majority opinion says on page 30, also this, and I now come to what I consider the most important part of my argument: The majority says about the middle of the page, at the end of the paragraph beginning on the page—one, two, three—the end of the third paragraph:

"Certainly there is no indication of the need for any further accumulation in the years 1930, 1932, and 1933."

In other words, as I put the minority opinion together with the majority, it was, I think, clearly the majority's opinion that such accumulations as were permissible had all taken place by 1929 and that the majority could see no need for any further accumulations.

Now, there is where I express disappointment amounting almost to despair, because once again the three Government experts had all taken that stand, in that corner of this room and testified with the utmost pointedness that they thought further accumulations in the years in question should have taken place, and I want to turn, if I may, to those. I think that I won't turn to them; it takes a bit of reading and I am sure that Your Honors will agree with me that if I say it is in the record it is in there.

In the record beginning on page 890, Mr. Merriman testified that in every year in question he would have accumulated some earnings, and the lowest that he would have accumulated in any year was 40 per cent, and the highest accumulated in any year was 50 per cent.

Dr. Atkins, he appears in 1015 to 1035, and Dr. Atkins testified that there was no year in which he would have accumulated less than 50 per cent.

And Dr. Friday, who testifies on this point in 1098 to 1104, testified that the lowest that he would have accumulated in any year was 30 per cent, and the highest that he would have accumulated in any one year, which was 1933, was 66 2/3 per cent.

And now I would like to turn to just one other part of the record, and see if Your Honors will—to see how cogent the testimony was; I am turning to page 890 to 894.

This is Mr. Merriman, the lead-off expert for the Govern-

ment, and I take him under cross examination when I am full of fire and enthusiasm and I look back with pleasure on that moment when I got him so readily to go exactly for the theory that Your Honors have failed to go for, that is to say, in your opinion Your Honors have said that there is no need for any more accumulations after 1929, and now let us listen, if you will, to Dr. Merriman:

This is my question:

"*Q.* Now, just one more thing, Mr. Merriman. When we talked about these years '30, '31, '32, and '33, you started saying 60 per cent might go out?

"*A.* Yes, sir.

"*Q.* And the next year, in '31, 50 to 60?

"*A.* Yes, sir; I think I said 50 to 60.

"*Q.* And the last two years 50?

"*A.* Yes.

"*Q.* It follows that you are in favor of some accumulations; aren't you?

"*A.* I have given you merely an offhand opinion as to what I would have done in those particular years.

"*Q.* And what you would have done would have been to have plunked for the theory of some substantial accumulations, wouldn't you?

"*A.* I am not certain about that. I have given you, as I have said, an offhand opinion.

"*Q.* When you plunk for the theory that you would declare out 60 per cent, you are plunking for the theory that you will accumulate 40, aren't you?

"*A.* Yes, sir.

"*Q.* And when you plunk for the theory that you will declare out 50, you are plunking for the theory that you will accumulate 50; aren't you?

"*A.* Yes, sir.

"*Q.* So the theory of accumulation in some figure for the 1940 crisis is subscribed to by you, isn't it?

"*A.* I don't consider that there is a 1940 crisis.

"*Q.* Strike out the word 'crisis'.

"So that the theory of some accumulation for the 1940 liquidation of the Jersey Company is subscribed to by you?

And may I say here for a minute he tries to escape me, but oh, does he come back to me. His answer to that—I will read the question.

"So that the theory of some accumulations for the 1940 liquidation of the Jersey Company is subscribed to by you?

"*A.* No, sir. The theory of some accumulation is based on the fact that it is always wise to retain some proportion of your earnings for unforeseeable difficulties or unforeseeable opportunities, either one, and that is the basic theory on which I would tend to reserve a surplus as a matter of insurance against the unforeseeable.

"*Q.* And the difficulty, Mr. Merriman, of liquidating the Jersey Company in 1940 was entirely unforeseeable in '30 to '33"—And he said "I would—

"*Q.* May I finish my question, sir?

"*A.* Certainly.

"*Q.* What difficulties might, in fact be met in liquidating the Jersey Company in 1940 and ridding this enterprise of its debt were, of course, entirely unforeseeable in the years 1930 to '33, weren't they?

"*A.* Yes, sir."—

And listen to this.

"*A.* Yes, sir; and in view of that fact I would have advocated the elimination of the Jersey Company at

or prior to 1933, whenever financial conditions were good."

And I started to say something, and I said: "I think that is—", and the Member said: "At or prior to what?" And the witness said:

"1933, whenever financial conditions were good."

And I burst in again, and I said:

"*Q.* Don't you also mean at or prior to 1940, too?

"*A.* Yes, sir."

And the Member here, I can see the drama of the court room at this moment, the member just took him away from me, and he said:

"I don't understand what 1933 plays in your mind as to the elimination of the New Jersey Company at or prior to 1933."

And the witness answered:

"Mr. Welch has had me at a theoretical director's table, and I would have considered long before 1933, Your Honor, had I been at such a directors' table, that the New Jersey Company played no useful function in the Chicago Stock Yards enterprise, being virtually nothing but a conduit from which money flowed from operating companies up to the Chicago Stock Yards Company, and I would have tended to eliminate that because of the nuisance that might be created by a minority common stockholder, even though his 9 per cent dividend was guaranteed. There would be a question in my mind as to what he might do after 1940.

"The Member: Aren't you interjecting an entirely new suggestion now than heretofore? As I understood, the alternative suggestions have been as to whether the New Jersey Company should be liquidated or elim-

inated, as you speak of it, at the expiration of its charter in 1940, or should be refinanced and by some means or other projected into the future. Now, do you mean to add to that alternative suggestion the third suggestion that it should, indeed, have been eliminated long prior to the expiration of its charter in 1940?

"The Witness: It might well have been eliminated prior to that time, the elimination being timed when the refinancing of any obligations that it had outstanding would be comfortable, would be accomplished under normal financial conditions.

"The Member: Well, do you take 1933 as that time? Is that why you said 1933?

"The Witness: No, sir; I don't consider that 1933 would have been a good time to do it, but I would have considered that in 1933 the company might well have looked forward to doing that, when we had a normal market for the sale of bonds and high-grade fixed interest-bearing stocks, which I think in '33 was—at the end of 1933 was certainly in reasonable prospect within two years, if not earlier.

"The Member: Well, now, then, as I understand what you intended to have me understand was that during the years 1930 to 1933 it would have been the part of wisdom for the corporation to have contemplated the earliest elimination of the New Jersey Company when financial conditions permitted?

"The Witness: Yes, sir.

"The Member: Not to wait until 1940?

"The Witness: Yes, sir.

"The Member: And certainly not to project it beyond 1940?

"The Witness: Yes, sir."

And the Member, still almost incredulous, said:

"The Member: Is that the situation?

"The Witness: That is."

Now, as I read this testimony here, my mind went back to those days in the court room when the Government experts took the stand and when one after the other had substantially this colloquy with me and of course I have greatly shortened it but it is substantially this colloquy:

Dr. Atkins, you would not have declared out all of this company's earnings in the years of 1930 to 1933, would you? *A.* No, sir.

Q. You would have accumulated some, wouldn't you? *A.* Yes, sir, Mr. Welch.

Q. How much, Dr. Atkins? *A.* Never less than half.

Q. And for what purpose, Dr. Atkins? *A.* For the purpose of liquidating the Jersey Company in 1940.

Dr. Friday takes the stand and I have the same colloquy:

Q. Would you have accumulated in the years here in question, Doctor? *A.* Oh, yes, Mr. Welch.

Q. How much? *A.* Never less than 30, sometimes 66 2/3.

Q. For what purpose, Doctor? *A.* For the purpose of liquidating the Jersey Company in 1940.

And Merriman comes along and I have the same colloquy with him, and when I reached the question:

Q. For what purpose, Mr. Merriman? *A.* Liquidating the Jersey Company.

Q. In 1940 as between the Member and myself? *A.* Oh, no, not 1940, necessarily, I would do it before, if I got the chance.

Well, if I may ring in a slightly personal note, if I ever succeed in ultimately losing this case I shall find myself in the position of a lawyer who had all of the evidence from both sides his way, and I shall be in the unenviable position

of having conducted myself with such incredible and beautiful ineptness that I lose a case that just could not be lost on the evidence.

Every one of the Government witnesses gave me three cheers, and said, Surely we will liquidate the Jersey Company, and the only difference he had with me was, that he thought that he would save a little less and hope to borrow more, which hasn't anything to do with the purpose. He said, the purpose to save, and the liquidation was sound, and if some day my clients have got to write a check for five or six million dollars because this case was lost, I will be in the unenviable position of representing a client who wrote a check in that size, including interest, who did not owe that tax any more than I owe it, and I don't envy myself in that position, but I might add that I still hope, with the gorgeous hope that I am never going to reach that position.

That leads me to say one other thing. I don't suppose that there could possibly be a member of this Board who joined that majority without reading all of this record. I say that because I just would not want to practice law before this Board unless I knew implicitly that every member of this Board has read this record. I do know, however, that you are often sent to far parts of the country; a long assignment, and I know the great pressure of work under which you all labor and through you gentlemen who sit here I send a message to any member of the Board who has not read this testimony, and when this argument is printed, as I mean to have it printed, and circulated, I think that I may print this in red:

If there is a member of this Board who is so far afield or so pressed with work that he has not read this record, I beg him to read about a hundred pages only, and I don't ask him to read the testimony of my friends, I ask him to

read the testimony of my enemies; let that member, if there is such, read Merriman's cross on pages 827 to 908, and let that member, if there is such a member, read all of Dr. Friday's testimony, pages 1071 to 1105.

Now, I think everybody in the court room will be relieved to know that I am approaching the end of my argument. What is the present situation as we stand here?

It is that the Board has solemnly said, We just don't believe this story about the Jersey liquidation, and we just don't think the plan is reasonable enough to command the respect of intelligent men.

Now, I have done a good deal of thinking about how the Board could have reached that conclusion. To do so meant that they had to disbelieve, as I view it, not only my witnesses but the Government's witnesses.

Well, thinking of my own witnesses, I thought about demeanor—that is a good ground to disbelieve a witness, if he acts shabbily on the stand, and so if the majority wishes to disbelieve all of the statements of Mr. Prince's intentions that were put into the record one after the other, they could do so on the ground of demeanor, that the witnesses just did not seem convincing.

Another ground that they could do it is on the ground of interest, and bias, and they would say, and on the whole it would be true, all of the witnesses are employees of the enterprise, and you would not expect them to come in and say things that would hurt the enterprise. I am inclined to discount the testimony for that reason.

Or you could say, finally, Well, the story is just so unreasonable it does not permit belief anyway.

That seems to be, as I have thought about it a lot, that seems to me the only way that the Board could have disbelieved these witnesses.

Now, to go back to demeanor: I venture to suggest that

no member of this Board would wish to decide against the listening member on demeanor because you just can't judge it from a written record, and I have dismissed that. I am convinced that the majority did not disbelieve my witnesses because of demeanor.

Well, then, I thought of interest and bias, and I said: It is only fair to say, Welch, you are a little bit vulnerable there because they were all men having to do with this enterprise. I will admit that they were men of stature and they impressed me but then I am easily impressed with my own witnesses, and this business of interest and bias seems so closely related to bearing on the stand, that I thought the majority ought to go along with the minority anyhow, because they are so closely related.

And then I remembered that there was one perfectly unbiased witness, and that was Mr. Walker, whose testimony I have already read, who said, I can almost quote it verbatim, he was, you remember, the expert, you might well have missed his testimony because it was tucked in at the end of an expert's testimony, and he said:

"There can be no question about Mr. Prince's plan, he has told it to me many times. It was to eliminate the Jersey Company, and to save up cash with which to do it."

Now, Mr. Walker is a partner in Kuhn, Loeb & Company. Some of you men may remember that he played a fascinating and public service role in the Giannini bank situation in California. He is a man of stature. The record discloses no interest of his in the outcome of this case, and indeed there was none and could not be, so I was inclined to say, Well, the Board can't disagree with or disbelieve all of my witnesses because of interest, because of Mr. Walker, and then I was forced to the last thing, that you must have disagreed that the Jersey Company was going to be eliminated

because it just seemed unreasonable and fantastic and you and the majority practically said so in its opinion.

Well, I was pretty despairful about that. I could not tell it in the court room any more than in the sense of a plan, or a hope that we had all of these years that we meant to carry out, but now, what has happened?

The long delay between the trial and the decision just happened to be such so that what the Board thought was this incredible thing that would not happen, did happen. The Jersey Company is in liquidation, and the date on which it went into liquidation seems to be of some importance.

The decision in this case was on March 20, and if Your Honors when we all leave here will look at the McDonough affidavit, on page 10, you will see that eight days before this decision came out a report went out, and if Your Honors please, you will find it on page 10, eight days before the decision came out, a formal notice went out to every stockholder of the Jersey Company, which said in substance:

"Dear Stockholder: This company comes to an end on July 10, it will cease to do business, and will continue only for the purpose of liquidating its capital."

That as I say, was eight days before this opinion came down. Similarly eight days before the opinion came down the liquidation was actually embarked upon, and the first call on the Maine treasury was made.

That was a call for $4,000,000, saved up, so my witnesses said, for this very purpose, and that call was later increased to $5,000,000.

Seven days after the opinion came down, the $5,000,000 moved from Maine to the Jersey Company, and ten days after the opinion came down the trustee of the Jersey bond issue had $14,000,000 placed in his hands to pay off the issue.

Between the date of the trial and the date when Mr.

McDonough made his affidavit, the Maine Company acquired 29,000 shares of preferred stock to put the liquidation through, as it said in this court room that it intended to do, and those 29,000 shares of stock, by the way, were acquired all during the period of time after the trial of the case here, and before the decision came down.

Now, on the second affidavit, as presented to Your Honors this morning, the Jersey liquidation is practically accomplished. This is July 18. Eight days ago the Jersey Company ceased to do business, and it no longer has a Board of Directors as such. They are now merely liquidating trustees, and they are liquidating its affairs.

Now, what is the position of the Board?

If this motion of mine to reopen this case and put in this cogent evidence is not granted, the position of the Board will be this:

It will have decided this case on the basis that a plan for liquidating the Jersey Company either was not honestly entertained and adhered to, or else was so fantastic as not to command belief of men like yourselves, and yet as I stand here, the thing has happened. What my witnesses said would happen, has happened and certainly no member of this Board wishes this decision to rest upon the assumption by the Board that something just would not happen, that you could not believe it would happen, when in fact it did happen.

Now, I don't even know, Mr. Clark, whether my motion to add this evidence to the record is seriously opposed or not. I could imagine that it might not be. It seems to me that the situation of Mr. Clark is not unlike that of a district attorney who has secured conviction of a suspected person and then upon a motion for a new trial has before him an affidavit of unquestioned veracity in which somebody

else confesses to the crime for which somebody stands convicted.

It is my guess that Mr. Clark's position is not unlike that of the district attorney, and that he would not violently or passionately oppose the reopening of the case for the purpose of taking this evidence.

Now, what I have said leaves little to be said on the other two motions, which I said that I would deal with at the end.

There is a motion for re-argument of the case. Naturally when the new evidence is introduced there will be an argument as to its effect at that time. I should suppose that that motion for re-argument might well be granted at this time, or held in abeyance. I don't care much. Naturally an argument would follow when the new evidence is introduced.

That leaves only the motion for additional and substituted findings, and once more that can not adequately be dealt with until this evidence is before you, so my suggestion and my very earnest prayer is that Your Honors will allow the motion to reopen the evidence to show that what you believed would not take place did take place, which will allow the motion for re-argument which would be natural any way, and that you will leave in abeyance the motion for additional and other findings until such time as that evidence is received.

Member Smith: Mr. Welch, the conclusion of the Board was predicated upon these propositions:

That the Maine Company is a mere holding or investment company—that is the first basis;

And the second basis was that it permitted its gains and profits to accumulate beyond the reasonable needs of the business; and

Third, that this was done with an idea on the part of the principal stockholder to escape surtax.

How would the inclusion of this additional or newly discovered evidence into the record change the actual result?

Mr. Welch: Because if Your Honors please, in this case as in all cases, you must go to what you have often called the deeper question. Use the presumptions if you wish. I never cared whether they existed or not, when I argued, I said I don't really care whether you think we are a holding company, I have got the evidence on the intent and everyone agrees with me, and my evidence is that the earnings were allowed to accumulate not for the purpose of avoiding the surtax, but for the purpose of liquidating the Jersey Company, and every Government witness has said to me that if he sat in Mr. Prince's position, he would have done exactly the same thing.

I said that I have shown affirmatively that the intent to avoid surtaxes did not exist, and I have shown you what the intent was, and everybody has agreed with it, that it is honest and reasonable and decent intent and I don't care whether the presumptions are here or not. I am dealing with the heart of the thing, the ultimate thing, and now the test comes here.

I could only promise, so to speak, that we meant to liquidate the Jersey Company, and that is why we were saving funds, and now the promise has been fulfilled, and I don't see how, in all humility, I don't see how it is possible for this Board now to conclude that those earnings were accumulated for any other purpose. They have been used for that purpose, just as the witnesses said they would be.

Member Smith: They were accumulated at least in part and in large part to buy up the shares of stock of the Jersey Company, which of course were not liabilities of the Maine Company or of the Jersey Company.

Mr. Welch: But you can't control the destiny of the

Jersey Company in 1940 unless you are a stockholder. Your Honor is back now on the hit and run theory. If you are going to control the destiny of the Jersey Company you have got to own its stock, and you have got to own both preferred and common because they both vote.

Member Smith: Do I understand that this motion that you have been arguing, if it is granted, that at the same time or at a later time you are pressing your other motions?

Mr. Welch: I have already been informed by Mr. Grimes, I think I am correct, that the Board as a whole would consider the motions that have been made and the argument in support of them. I may be misinformed but it was my thought that this motion being a very critical one as I view it would on some occasion, perhaps not within 30 days or so, be passed on by the Board, and that the Board would then say, All right, Mr. Welch, will you kindly come to Washington, setting a date, and present the evidence that you say you have.

Member Smith: Mr. Clark.

Mr. Clark: Of course, Your Honor, we very earnestly oppose the motion. So far as re-argument is concerned, Mr. Welch has gone a good deal further than I had anticipated this morning and it seems to me that really he has re-argued the case as he sees it, and from his point of view. I want to address myself, except to such extent as Your Honors may wish definite replies to such questions as come up, particularly to the proposed receipt of this evidence, which I believe is not proper and is of such a character that not only it does not properly belong, but it is inadmissible material and has no bearing.

Now, although—and I think Mr. McDonough states this in his affidavit, although it has come into existence since the hearing, it is not newly discovered evidence in the sense

that it was evidence then existing, which was unknown to or unavailable to petitioner. It just was not there.

Now, here it has come into existence, and why and how can it be taken in and of itself, as any adequate support for an intent which was supposed to have been born in 1911, or thereabouts, and relative to which there is a great mass of documentary evidence before the Board?

Mr. Welch, as I think would be quite natural with him, a highly capable trial lawyer and jury lawyer, has his mind set right on the oral testimony and the record thereof. I think that he fails to realize, perhaps, or at least does not find it necessary to emphasize at this time, the intent and purpose which is derived from inspection of that documentary evidence, from the conduct of the taxpayer, and of Mr. Prince as disclosed thereby, and on which the Board has commented and on which it has relied to a very great extent in its opinion, and most properly so.

There is also this to be borne in mind in that regard. In considering the National Grocery Company case, the Supreme Court dwelt upon a situation no doubt somewhat similar to this, and said in the last paragraph of its opinion:

> "The Court expressed the opinion" (referring to the Circuit Court of Appeals, of course)—
>
> "The Court expressed the opinion that the Board failed to consider relevant and controlling facts, that it relied upon improper evidence in reaching its conclusion, and that it failed to make the findings required by the statute. There is nothing in the record to justify that view. The findings quoted above are specific. The Board was not obliged to accept as true Kohl's statements of his intention and purposes or to accept as sound the opinion of his experts. It was error to reverse the decision of the Board."

Now, of course, when one is representing the Government in tax cases, one is constantly confronted by witnesses who quite honestly, no doubt, and I am not intimating anything to the contrary, quite honestly find that their intent as they can set it forth in words was such as to be of material assistance to them in a tax case which is in hearing at the time.

We have nothing to refute that in the way of testimony. We can't produce witnesses under any ordinary circumstances who can refute their flat statements as to what their intent is, and we have to resort, as we do all the time, to what is shown by the records of transactions which have taken place, and outside circumstances which make it unreasonable to conclude that statements of these witnesses as to their intent is really the last and determinative factor.

Now, in regard particularly to these documents, as I say, they all record transactions and corporate meetings, votes and activities which have taken place after the prior hearing.

Now, perhaps I am wrong but it certainly is not my idea of a rule of evidence that that is newly discovered evidence. It is evidence newly brought into existence, and I don't think it is admissible right on that ground. Certainly nothing that transpired subsequently to the date of the Board's opinion could properly be admitted in evidence, in my point of view, and now let us see, perhaps, why all of this has transpired? There is comment by my brother, and reference to testimony of some witnesses, to the effect that the Jersey Company might well be liquidated in 1940 or might well have been liquidated prior thereto.

Now, up until 1936, the liquidation would have resulted in a very heavy tax payment on the part of the Maine Company, so in that respect there was a change by Internal Revenue Code 112 (b) 6.

Member Smith: That was in the 1936 Act. I didn't have

it at the time that I wrote the last three or four paragraphs of the opinion.

Mr. Clark: That altered the situation, then, and merely made it necessary for the Maine Company to acquire a total of 80 per cent of all of the voting stock of Jersey Company, in order to be able to make it tax free on liquidation, but there certainly would not be any reason to suppose that prior to 1936 anything that now transpires or now is ready made, can be treated as in support of an intent said to be born in 1911, when a liquidation at any earlier date than 1936 would have led to this heavy tax liability and there was nothing to indicate that the 1936 Act would make this change which would permit the company to so liquidate in 1940.

Member Opper: May I interrupt you, Mr. Clark, to ask you whether that was in the mind of the Government's experts when they testified with respect to what would be sound practice?

I am referring now to that part of the testimony that Mr. Welch quoted and referred to. As I understand that they were talking about these very years, 1931 and 1932.

Mr. Clark: Yes, sir.

Member Opper: And at that time, if I understand, it could not have been known that this would be a tax-free liquidation but nevertheless as I understand it no reference to that as a reason for withholding the liquidation was made by Government's own experts, and no disagreement was expressed with the idea that it should be liquidated in 1940 or before, is that correct?

Mr. Clark: Yes, sir, I think that that is correct.

Member Opper: Have you any explanation for that?

Mr. Clark: I think this. I think in the first place we have to keep clearly in mind what to me is the real point at issue here, and that is whether this is Prince, who is acting

throughout in his own behalf, or whether he is Prince acting as president of the Maine Company in all regards, and whether the Maine Company consequently can be said to have all of this plan in mind, and to be intended to be the instrumentality by which it should be accomplished.

It is relative to that where I think the expert witnesses perhaps in their thought or theory and their replies to questions, took the attitude that this was all being done by the Maine Company when according to my contention it was all being done by Prince.

Member Opper: But your own, Government's own experts, took that position?

Mr. Clark: The Government's own experts, it is true, Your Honor, stated that they saw no sound reason for the continued existence of Jersey Company but they also stated, and it appeared in the record, and I think it was read by Mr. Welch in some of the expert testimony that he read, that it could be refinanced.

They simply felt that in that set-up, there existed no particular reason that they could see for keeping the Jersey Company alive, but that did not mean, as I take it, that they felt that it would be a reasonable and proper thing for the Maine Company to get in the Jersey Company and swallow it whole in 1940, tax-free, for the benefit of Mr. Prince. It would be fine, perhaps, if it could be done but I don't think that there is anything in their testimony that would lead to that conclusion.

My attention is called to the fact that instead of liquidating or taking a step in that direction, a step in the contrary direction was taken in 1932, when F. H. Prince & Co., Inc., came into the picture. I don't at the moment remember how much of the stock of the Maine Company went into that corporation's hands and I don't think it is material but it was a substantial amount. I am told 60 per cent. That is

not according to my own recollection but I have no doubt that my advisor is correct. That means a step taken in reverse direction. That was a step taken toward expansion.

Have I answered what Your Honor had in mind?

Member Opper: I am going to have to leave that to you, Mr. Clark, if you think you have something more that bears on the question—

Mr. Clark: Your immediate question, the one that you are interested in is to what explanation I have for the Government experts as well as the experts for the petitioner being in accord that it would be a good idea to wind that company up in 1940.

Member Opper: As I understand it, indicating that the way to do it was to accumulate earnings in the Maine Company.

Mr. Clark: No, I don't think that that is so, but I will have to have some reference here in order to indicate the contrary, if such exists, and I believe it does.

Member Opper: I may have been unfair in asking that question to this extent but I think it was suggested in the beginning that you were preparing to address yourself only to the question of the admissibility of this later evidence, and if you, under the circumstances, feel that you are not prepared to answer the question, that is something else again. However, I don't withdraw the question as being one that I think is a natural one to ask.

Mr. Clark: I think Your Honor is quite right, and I did not mean to give the intimation that I did not want to answer questions at all but as I did indicate it seemed to me that Mr. Welch had practically re-argued this case this morning and that was something which I did not suppose

was to come up at this time. I had thought we were to address ourselves specifically to these motions, which had been filed. If I can find something here without delaying the Board too long, I would certainly like if I can do it to clear such doubt in Your Honor's mind.

I am very sorry to have to delay here at this time, and I wonder if perhaps I might pursue my original thought, although I would rather follow up exactly what the Board wants in that regard.

I was going to say, to go ahead on my original line as to the admissibility of this evidence, and then pick this up after luncheon or if I had better pick it up now and ask for a recess at this time?

Member Smith: May I ask Mr. Welch, if you want to make any argument with respect to the motion for modification of the facts at this time?

Mr. Welch: I have indicated that I would much prefer to make that argument after action on the motion that I have argued at length, and even if the action of the Board were adverse on my motion which is difficult for me to contemplate, the thing is in such a state of flux that it is an unhappy time to argue that motion now and I would hope to argue it at a later time, no matter what action is taken on the motion to re-open.

Member Smith: We will recess at this time until two o'clock.

(Whereupon, at 12:30 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same day.)

AFTER RECESS

(The hearing reconvened at two o'clock, p.m.)

Member Smith: We will proceed.

Mr. Clark: I think just before recess I had not quite understood what the Board member was asking for, and now I think that it might require some more elaboration than I had thought by references to the record, because I was speaking at that time about the fact that we were in another era in 1940 relative to the tax liability which would result to the Maine Company in the event of liquidation on the part of the Jersey Company, and that that era was only created by the 1936 Act.

One of the members asked me as I now think I understand the question, whether I thought that the experts who had testified that the Company ought to be liquidated in 1940, as there was so much conversation relative to this morning, took that into account. At least that is what I understand the member wishes to hear about.

Now, so far as that is concerned, their testimony—I am talking about our own experts now, the Government witnesses now—was predicated on the idea in general that the companies—the words "liquidate" and "refinance" were used, but that either liquidation or refinancing or refunding would have to take place in 1940.

On that point I wish to refer with the indulgence of the Board, to some testimony, a part of which was read by counsel for the petitioner this morning, but there is some more of it that explains much more fully what the real attitude of the experts was, than confining that to the parts which were referred to this morning.

So far as having in mind the tax situation in 1940 as bearing one way or the other on their opinions, I have no idea that the experts were not aware of the situation, and I don't see how they could have testified if they had not

taken that into account, although I can't point to any place in the record where they are directly asked relative thereto. If such a place exists, and there is such a record, I don't know of it at the present time.

So far as any statement that was made by, and I believe it was made by Mr. Merriman, where he referred to liquidation at an earlier date, and I think prior to 1936, I don't know whether he had the tax situation in mind or not, but I would imagine that a tax expert would be the one called in by a business house for careful instruction in that regard, although I do think that an economist certainly would be understood to have in mind the era in which he was living at the time, with reference to a liquidation when he knew that there might be millions of dollars of tax involved; but I can't point directly to the record in that regard.

However, the experts for the respondent, Friday and Atkins, as I understand their testimony, and I think it is pretty clear, didn't mean to bind themselves to statements to the effect that they felt the right thing to do upon a sound business policy and all of that sort of thing was to wind up or terminate or to end the Jersey Company necessarily in 1940, not necessarily at all, and it might not be wise, and I think they said it might well not be wise at all to do that, but that that was one way of doing it, but that there were alternatives; and I think that if the Board will indulge me, I would like to read more at length from the testimony in the first place of Dr. Friday, and I am referring to page 1082 of the testimony, it is the third full paragraph on the page.

> "I have not found much difference of opinion among any of the witnesses. I have read their testimony on this point, and I am in agreement that it should be liquidated in 1940. I am also of the opinion that it is not necessary that it should be liquidated in the sense

that the company of that name should go out of existence; the charter might be renewed and extended; but in my opinion it would be best that it be liquidated."

Now, turning to page 1083 where he goes further, and omitting from the record the intervening material, in the first full paragraph starting on that page he stated:

"Now, I considered the matter thoroughly and decided that the most that could be set up, in my opinion, as reasonable needs was an amount which would enable the Maine Company to liquidate these bonds and debentures and pay the debts of the company in 1940, and that would require that $23,963,000, as is shown in the first column, that between 1930 and 1940 certain of the bonds that were outstanding here would have been paid off, particularly the Chicago Manufacturing District bonds, which are serial bonds, and, as I remember, the serial bonds would have extinguished this completely by 1940. But taking this figure of $23,963,000, if the company has that much money on hand in 1940, or assets which can be completely converted into money, then it can pay them off, in which event the collateral behind these 14 million dollar face value of bonds of the New Jersey Company would be released. Now, that collateral consists of the entire stock, as I remember it, of the Chicago Stock Yards and Transit Company and also of the entire stock of the Railway Company, which owns the lease, owns the road, and which also owns the lease to the New York Central, which yields $2,000,000 a year, all told. Such an item of collateral, free and clear of the debt, and yielding the income that it does, the company would not have the slightest difficulty at all in obtaining financing if the Maine Company with which to take care of the preferred stock, which only amounts to $6,500,000, and with which to

redeem such common stock as may still be outstanding at that time. The difficulty or the needs that confronted the company during the years, from the standpoint of making a smooth transition from the old organization into the new one, this company would be kept intact without any embarrassment of any kind.

"So, it appeared to me that the needs for the ten years from 1930 to 1939, in preparation for 1940 were rather moderate, and that the retention of the amount of earnings, such as was retained in 1930 and '32, was beyond the reasonable needs of the business."

And then referring to Dr. Atkins' testimony, beginning at page 984, I don't recall whether Dr. Atkins was under cross-examination or direct at the moment, let me see if that is shown. That was direct examination, it is the second complete paragraph on the page. It is a question.

"Q. Dr. Atkins, you have either heard or read the testimony to the effect that a large accumulation of gains and profits had to be kept by the Maine Company because of the necessity to meet the financial obligation of the New Jersey Company in 1940?

"A. Yes, sir.

"Q. In the light of your experience do you consider this an advisable policy?

"A. No, sir; I don't feel it to be an advisable policy.

"Q. What are your reasons therefor?

"A. Because I feel that there are other and more satisfactory ways of meeting that situation. It seems to me as though there are two major ways which might be combined in order to deal with the maturities which will take place in 1940.

In the first place, I am convinced from my study of the stipulation, exhibits, and so on, in this case, that it

would have been wise for the Maine Company to have purchased a substantial amount of the securities whose maturity would arrive in 1940 prior to this date. I think that it would have been wise for them to have pursued that policy prior to the years in question at various times. I think it would have been distinctly wise policy to have made purchases during the years in question, at which times the market prices of these securities were decidedly below par, and, as I indicated yesterday, in December 31, 1929, the Maine Company had large liquid resources, a very substantial part of which was in the form of cash, and a further substantial part, so far as I can learn, in the form of general market securities.

"It would not have been possible with the resources available during these years to have retired all—purchased all of the securities in question, but I feel that if I had charge of the situation, having pursued that policy, as far as the circumstances would reasonably permit, to plan then to refund the securities that were maturing in 1940, and, thus eliminate the necessity of accumulating funds in this way, pay them off in full.

"The Member: May I ask you to elucidate what you mean by refunding after you said they couldn't have been purchased?

"The Witness: I mean by that to retire, pay off these securities by the issue of new securities from which funds might be obtained for the payment of that portion which had not been acquired.

"The Member: You mean the kind that could not have been bought?

"The Witness: Where there was not sufficient funds to have bought them during this period.

"The Member: Were they callable? Could they have

been refunded before their maturity if they couldn't have been purchased?

"The Witness: No, Your Honor, not the New Jersey bonds. They were non-callable, I believe. Apparently I haven't made myself entirely clear.

"What I meant to indicate was that I would arrange for their refunding of any amount not purchased at the maturity of the bonds.

"Have I made myself clear there?

"The Member: Well, I think I understand what you say. Do you mean that although the issue would have been outstanding as an issue with some of them not purchasable because they weren't available for purchase, nevertheless you would have purchased those that you could have purchased and refinanced that part; is that what you mean?

"The Witness: And refinance the part which I could not purchase before 1940, in 1940, at the time of the maturity. I am not suggesting to call in the bonds which I understand were non-callable, but what I want to say, trying to say, is that I would have purchased all of the bonds which the circumstances would have made reasonably possible, giving due consideration to all of the various factors, immediate consideration; and the maturities of the bonds which I had not purchased, I would have arranged for their refunding, refinancing at the maturity date.

"The Member: At the maturity date?

"The Witness: Yes.

"The Member: In 1940?

"The Witness: In 1940. I would refinance what I could not purchase in the meantime, those I had in my possession.

"The Member: Well, you have to refund those if

you are going to do anything about it in 1940. You have to pay them. You have to redeem them in 1940, don't you?

"The Witness: Yes, sir.

"The Member: I don't get the thought about refunding them in 1940 if the corporation is going out of business. It is, isn't it, in 1940? The bonds are going to mature, become due.

"I don't understand what is meant by refunding those bonds of the forthcoming extinct corporation.

"The Witness: I will see if I can make myself clear in that regard.

"As I understood the question, it was whether or not I would attempt to accumulate in the treasury of this enterprise sufficient cash funds for 1940 so that when those bonds matured in 1940 I would have sufficient cash in my treasury from the accumulation made up from earnings during this period, reserved for that purpose, a sufficient amount to pay off those bonds, and I indicated that in my opinion I would not attempt to accumulate the full total amount, pay off those bonds at maturity. On the other hand, what I would do would be to purchase currently during this period bonds as they might become available, and as funds might be available to be used for that purpose, as many as I could, giving due consideration to those circumstances, and that in 1940 when the bonds matured I would arrange to pay them off from funds obtained by the issue of new securities.

"The Member: Is that all you meant by your expression of refunding the balance?

"The Witness: Yes.

"The Member: Yes, all right."

This is the way the testimony in the record runs, in any event.

"The Member: Yes, all right.

"The Witness: I think so. That is the result I was trying to obtain."

Now, on page 989:

"A. (Continuing) It seems to me that this procedure which I outlined is a perfectly possible and reasonable procedure to follow, and one which would be to the best interest of the enterprise.

"If I may refer to some figures to indicate why I think this would be possible, I find that in the treasury of the New Jersey Company is a block of Indiana Harbor Belt 4's, par value of 2½ million dollars. Upon the payment or refunding of this issue, those bonds will be released and available for disposition, sale.

"I also find that on December 31, 1933, there were loans by the Maine Corporation to Mr. Prince, which I understand were liquid loans, and he was presumably in a position to repay, thus placing the Maine Company in funds.

"I also find that the Maine Company at that time had cash of $7,500,000. I made reference to the other investments by the Maine Company. Presumably they were general market securities. And I made no reference to any of the other liquid assets of any of the other companies of this group.

"The total of those amounts would be, in round figures, 15 million dollars at that time.

"I find that maturing in 1940 were 14 million of the New Jersey 4's and 5's.

"I find that maturing in 1945, but guaranteed by the New Jersey Company, $2,327,000 of Elevated Railroad bonds, which presumably would demand consid-

eration at that time. And I also give consideration to some other securities, which might or might not demand consideration, depending on the action taken.

"The New Jersey Company preferred stock of 6½ million, and Maine bonds of approximately—outstanding in the hands of the public, amount to $3,200,000. And I also put in a figure in excess of $300,000 to represent the value at the approximate market price of the nine dollar guaranteed common stock of the New Jersey Company in the hands of the public, making a total of $26,850,000 in round figures.

"Now, one of two courses of action, it seems to me, will be possible: One is to continue the New Jersey Company by procuring a renewal of its charter, which, while obviously not sure at this time, nevertheless seems to me to be a matter which reasonably—a consummation of which might be reasonably contemplated, if it should be desirable.

"Mr. Welch: You say should be desirable?

"The Witness: If it should be desirable.

"Mr. Welch: Yes.

"The Witness: No definite bar of the decision is made in that respect.

"Mr. Welch: I see.

"The Witness: Another possibility would be the elimination of the New Jersey Company and the assumption of its assets and liabilities by the Maine Company.

"I confine myself to those possibilities, although I think there are others which might be employed.

"If these liquid assets which I referred to were devoted to the retirement of the securities in question and other funds obtained from refunding were obtained to meet the difference, an amount of 12, 15 million dol-

lars might be required. This, it seems to me, would be perfectly reasonable to anticipate, obtaining through a refinancing operation, which, if consummated, would eliminate the debt, the present existing debt, of the New Jersey Company, the Maine Company, the Elevated Company, leaving no debt against them, and making it possible to use the stock of the Transit Company, the Railway Company, and, in addition, if desired, the stock of the Produce Terminal Company and of the Central Manufacturing District as security for obtaining these funds. It does not appear to me as though it would be necessary to use all of these securities as a basis for this refinancing operation.

"The Member: Can you tell me briefly what you mean by refinancing?

"The Witness: By the Sale—I will put it this way: When bonds mature and become due, it is necessary, if the company is to remain solvent, to pay them off. One of the ways in which funds may be obtained for paying off securities that are due is to buy an issue of other securities, from which funds might be obtained. If this is done in collateral or other assets which may have been used to secure this issue, they are released and become available as securities for the new issue.

"The Member: Is that what you mean by refinancing?

"The Witness: Yes.

"The Member: Now, cannot that be stated, in the layman's language, as substituting new creditors for the old ones?

"The Witness: In the layman's language, yes.

"The Member: What is the point in that? What is the point of liquidating the debt of A by borrowing money from B to create a debt to B?

"The Witness: Because—

"The Member: Generally speaking, that is what you mean by refinancing?

"The Witness: Yes. That is, Your Honor, constantly being done, particularly in the case of industries of various kinds, where the investment in them is of a relatively permanent character.

"We can see that, of course, in—take an illustration from an industry outside of this field, the public utility field, where they constructed a large generating and distributing system for electric power. The expectation is that that system will continue for an indefinite time. Funds to create this system are obtained by the sale of bonds with a maturity of relatively a short number of years as compared with the expected relative durability of the generating and distributing system.

"The Member: Well, that is because you are changing the terms of your indebtedness, substituting for a present indebtedness which has terms which you regard as, to some extent, unfavorable, substituting for that an indebtedness with terms that eliminate some of those unfavorable terms, and on the whole, are regarded as more favorable under the particular circumstances then existing. Is that what you mean to say?

"The Witness: No, because from time to time your indebtedness matures at a period when business conditions are such that it is necessary to obtain capital, obtain funds from a new creditor to pay off the ones due the old creditor on terms which are not so favorable as the terms on which the funds were obtained originally. You may better your terms or you may find your terms worse. The terms on which you can obtain your credit will depend on two major factors, the gen-

eral business and economic situation and the position of the borrowing corporation.

"The Member: Yes, but I am talking about the voluntary substitution of one indebtedness for another. You can only do that when the terms of your new indebtedness could be an improvement on the terms of the old.

"The Witness: That is true, sir, but here we have a definite date, 1940, when you have no choice in the matter. Your securities mature at that time. You will have to pay them off.

"I included the Maine bonds in this consideration partly on the assumption that the terms of the indenture, if I remember correctly,—if the New Jersey Company is not kept alive, the maturity of the rest of the bonds, I believe, will be in 1961; and I am including the other Railroad Company bonds in my consideration because they are guaranteed by the New Jersey Company, although they do not mature until 1945. Nevertheless, if the New Jersey Company is to be liquidated then it is necessary to make provision in some way for those bonds.

"I have given consideration in my study of this matter primarily to the financial considerations and not to a certain legal consideration as to the best state in which to incorporate, et cetera, and items of that kind."

Member Kern: Mr. Clark, what point do you wish to illustrate by the long extract that you just read?

Mr. Clark: The point, Your Honor, is that it is not fair to infer that all of the witnesses—I mean, the statement in the record that all of the witnesses said that the Jersey Company had to be liquidated in 1940 and recognized that fact. What they did state, of course I have to go to lengths

for which I am sorry, but what they did state was to the effect that if it was not liquidated these bonds would have to be refinanced, they might be refinanced or refunded or extended but there isn't the flat four-square statement by these experts that the company would have to be liquidated.

Member Kern: Liquidated in the sense that all of their securities would be paid off in cash?

Mr. Clark: Yes.

Now, I was speaking about in what I was saying relative to the admissibility of this so-called newly discovered evidence, I was referring to the time at which it came into existence relative to the situation of the case before the Board, the tax liability situation as it had changed and developed in 1936, so that liquidation could be made to the Maine Company without a very heavy taxation which would have resulted prior to 1936 and the intent which nevertheless had been testified to that this should be so liquidated in 1940, and it seems to me that even if otherwise it were in any way advisable that this can not be admitted as in support of a plan which was supposed to have been in existence for or at least which was argued was in existence from practically the inception of the corporation which was in 1911.

During all of those years, for example, as to one of these factors, the heavy imposition of taxes during the years when there were taxes in effect would have resulted. There was never any time after taxation statutes came into being, when there would have been a tax-free distribution until 1936. In that regard, and I am reminded to digress just for a moment, the point was made this morning as to a statement in the Member's opinion, at the bottom of page 33, and the top of page 34, about the transfer by Prince to the Maine Company of 17,000 shares of stock, and he was therefore relieved from payment of surtaxes. Counsel for

the petitioner then brought up the accountants' statement referring to page 12 of the findings of fact, that the Maine Company became indebted to him, and had to pay him interest thereafter, and that that really resulted in an increase of tax.

Now, as a matter of fact, it is interesting in that regard to note what taxes Mr. Prince actually paid during those years. This only continued through 1926, this situation, continued, I think, and it transpired in 1918, and in 1918, and I am referring now to the personal income tax returns of F. H. Prince, those are Exhibits Triple-C, Respondent's Exhibits Triple-C to Triple-T, in 1918, to be sure, Mr. Prince did pay a tax of $1,883.30.

In 1918 he paid nothing; in 1920 nothing; in 1921 nothing; in 1922, nothing; in 1923, $107.25; in 1924, $1,575.77; and in 1925 nothing; and in 1926, $5,613.50.

So that in fact it can scarcely be said to have increased his taxes in any way during that period.

Member Kern: Well, would his taxes have been any greater if the transfer had not taken place?

Mr. Clark: No, sir, that is true enough.

That, in general, is what I have to say on the grounds of the direct materiality or immateriality of this evidence which is now presented but there is another point which we have to keep in mind, and that is what the plan was in the first place, whose plan it was, and what there is in the record aside from the direct statements of witnesses, or including the direct statements of witnesses, as to the initiation and the purpose and incidence of that.

Member Kern: May I interrupt a moment? It is hard for me to get in mind what your point originally was before the reading from the record.

Was it to the effect that the petitioner could not have had this plan of liquidation in mind in the three taxable

years because during those three taxable years a considerable incidence in tax would have resulted from such a liquidation?

Mr. Clark: I do not say, could not have had it in mind, Your Honor. I said that there would have been a large tax incident to it at that time and what I have been trying to do, I understood the testimony was to the effect, and had it reiterated this morning, that this plan began back at about 1911, about the time that this corporation was instituted, and that that plan had always been in existence.

What I offered that for or commented in that regard was that it actually would have resulted at any time during these taxable years after it had been inaugurated, when taxes were not in effect, would have resulted in those years in a substantial tax payment.

Now, the bonds, it would seem to me bonds, if acquired, the normal way to approach this situation instead of buying any stock, if the bonds, the emblems of indebtedness had been acquired during this period you would have something to support the attitude of the corporation, or the attitude of those testifying as to the corporate activity that there was in connection with this plan and there were not any of those bonds bought and there was not even control of the voting stock bought. There was a substantial purchase of shares of stock, of common stock; there was practically none of the preferred stock that was purchased.

Member Kern: To try to summarize again, is it your position that the plan as originally formulated if it was formulated in 1911, might have been considered reasonable then because there would not have been any tax incidence but that since the adoption of the 16th Amendment and the passage of various revenue acts made such a plan subject to a tax incidence, and therefore it ceased to be reasonable during the time that there would be a tax incidence and

therefore the petitioner must be considered as having given up the plan because no reasonable taxpayer in that position would have retained a plan which would have entailed the payment of taxes?

Mr. Clark: I do think very surely, Your Honor, that the taxpayer would certainly have given careful consideration to some other means such as refinancing and refunding so that he might have avoided that tax situation in 1940 which was not in existence at that time, according to the evidence.

Yes, I certainly do, and there wasn't anything to indicate that this liquidation could have been accomplished without a tax liability up to 1936.

Member Kern: Therefore it would be unreasonable to keep on under that plan because of the fact that they might have to pay taxes, is that correct?

Mr. Clark: If you are going to run into what as I understand would be some 3 million or 3½ million, I have not figured it definitely, of taxes under the prior laws, I would think that it would not be a very wise course to pursue and it is one of the things which seems perfectly reasonable to make one feel would have led Mr. Prince to pursue another course, which he could have done in refinancing and avoiding it, yes, sir.

Member Kern: Was there anything in the record which would indicate that Mr. Prince ever had in mind taking the alternative which you maintain is a reasonable one?

Mr. Clark: You mean in the way of oral testimony?

Member Kern: Yes.

Mr. Clark: I don't at the moment recall anything.

Member Kern: Is there any documentary evidence to the effect that he ever contemplated taking the alternative which you commend as reasonable?

Mr. Clark: Well, now, I will have to stop for a moment and think on it. There is nothing to which I could refer

which would definitely appear to commit him in that regard. It would be merely inferential, so far as I could remember.

Oh, I must refer to something, yes, it is so easy to forget and in fact it is hard to remember that. Just a moment, if you please.

Yes, of course there is this factor, and it is commented on, I am very sure, in the Board's finding, that in 1911 in Exhibit S-42, which is attached to the stipulation, there was an indenture entered into between the Maine Company and the trustee, it seems to me it was the Old Colony Trust Company, relative to the issuance of some Maine Company bonds, and I believe it was paragraph 12 or some paragraph well along in that indenture, the Maine Company enters into the obligation to continue, maintain and preserve the existence of the New Jersey Company during this period.

Member Kern: What period?

Mr. Clark: That is just what I should have said but I forgot to. That was 1961 in this case, I think that you are thinking of Jersey Company bonds, which came due in 1945, these are bonds of the Maine Company; but there is an express agreement in the indenture applying to and committing the Maine Company to preserve, maintain, the existence of the Jersey Company.

Now let me see if I can refer or if I can put my hand on the language of that, if it is of interest.

I can't give you the page but it is in S-42.

Member Kern: That is Exhibit S-42?

Mr. Clark: Yes, and the excerpts from that are quoted in our brief, at page 9.

Member Smith: On page 5 of my report, findings of fact, it is stated:

> "On October 2, 1911, the petitioner executed a trust indenture providing for the issuance of $13,000,000 5 percent 50-year callable gold bonds, secured by all the

Jersey Co. common shares owned or thereafter acquired by it; it was required to do whatever might be necessary to maintain or preserve the corporate existence of the Jersey Co., but not to prevent the consolidation or merger of the Jersey Co. with, or the sale, or transfer of its property to, the petitioner."

There is one other item in the record with Mr. McDonough's testimony, it seems that either he or Mr. Prince had consulted counsel relative to the possibility of an extension of charter of the Jersey Company, if it was desired to do so.

Mr. Clark: And they were advised that it could readily be accomplished. I think that that is also in your findings. I don't recall but I think it is.

Was I interrupting?

Member Smith: No, go ahead.

Mr. Clark: Another bit of evidence having the same bearing relative to the bonds of the Jersey Company—now, they were selling below par, through this period, and that appears—it refers specifically to the exhibit now, but I know that such is the case and it can readily be verified and I will furnish that reference if necessary but at any rate they were selling below par, they were selling over-the-counter, and other places, and they could be bought and they were there and the prices in many instances were below par, and sometimes below 90, I think, but on that I don't commit myself because I don't have the figures before me, and the Jersey Company had, as I say, approximately $10,000,000 in cash during the years 1930 to 1933, our taxable years, I think the cash ran something like $6,700,000 to 9½ million, and they didn't go out and buy those bonds then and that does not show a purpose, it seems to me.

Member Kern: Just a moment. It doesn't show a purpose to do what?

Mr. Clark: Did I say the Jersey Company?

Member Kern: No, it doesn't show a purpose to do what, to liquidate by refinancing or a purpose to liquidate?

Mr. Clark: By acquiring bonded indebtedness to have the thing free and clear, but please let me make a correction for the record, because I see I have committed myself to something that makes it meaningless.

Despite the fact that petitioner and the Jersey Company and the subsidiaries had these amounts of cash during those years, instead of just the Jersey Company, as I have said—

Member Smith: Of course, that page 19 of my report there, I show the quotations of the 4 percent and 5 percent bonds of the Jersey Company.

Mr. Clark: Yes, sir, and it is from there that I got my figures.

Member Kern: Well, what plan on the part of the petitioner would you say that that indicated, the fact that they did not buy these bonds when they were below par?

Would that indicate that they were not going to take any steps in 1940, or were going to extend the company?

Mr. Clark: I think surely they would take steps in 1940: they would have to take some steps in 1940 but they, if they were acquiring the stock during these periods, why didn't they use the money to acquire the bonds; the bonds would have eliminated that indebtedness, and that would have been extinguished in 1940.

Member Kern: Proceed.

Member Smith: I might state at this point that I never had any doubt from the testimony in this case, that Mr. Prince and the others in authority here had an expectation all during the years 1929 to 1933 inclusive, to liquidate the Jersey Company. I think that the testimony warrants that, but was not the basis of any conclusion that I reached. If any member of the Board reached a contrary conclusion

from any statement made in the opinion, why it should be corrected, of course.

Mr. Clark: I had the impression that there was an intent to acquire free and clear, but I think that that intent and plan was the plan of Prince and not the plan of the new company, and what the Maine Company was used for, what it was committed to by Prince who controlled it, indicates that it was that to which I was going to move at the moment, and it was not the plan of the Maine Company, but that the Maine Company was used by Prince as a vehicle to carry out a part of that plan.

Member Smith: I could not find from the record any evidence that the Maine Corporation had any purpose except the purpose of Prince, and the company could not have; the corporation can't have a purpose except the purpose of its officers or directors, and I have no doubt that Prince had the idea, I think it was plain all through this testimony, that it was his idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares to pay off not only all of the bonds of the Jersey Company in or before 1940 but all of the indebtedness of all of the other corporations.

Mr. Clark: I think that he intended individually to hold it free and clear of debt. It is just the sort of proposition which could be used to swallow up and get complete ownership, for instance, of General Motors, or of any other enormous proposition, if you had the ways and means to do it, this was as good a way for him to accomplish it from a tax standpoint.

So far as actual liability for bonded indebtedness of the Jersey Company or any of its subsidiaries, that was all specifically disclaimed by the Maine Company, and its indenture of October 2, 1914, it was at that time as you will recall and I think that this has been gone into in the opinion.

that the Maine Company entered into a direct agreement with the Jersey Company whereby instead of having as previously been entitled to all dividends declared by the Jersey Company, in excess of 9 per cent it became entitled to all of the earnings of the Jersey Company in excess of 9 per cent required to pay the dividends on the stamped certificates.

And in the course of that indenture the Maine Company made certain commitments, among those commitments it guaranteed to pay the interest due on the bonds of the Jersey Company, and its subsidiaries, although in fact as has been pointed out in the Board's opinion, it never had paid anything on that guarantee.

But expressly it disclaimed any obligation for the principal of the bonds, so that so far as obligation on the part of the Maine Company, per se on its own account, it just didn't have any.

Member Kern: I would like to interrupt again, and go back, Mr. Clark. I think the course of the argument has had a sudden shift. I understood at first it was your position, that the petitioner could not have intended the liquidation of the Jersey Company, that it was unreasonable to consider that that was their plan, and that the petitioner was used for the accumulation of unnecessarily large amounts of surplus, whereas during these years it was the intention of Prince and the petitioner to not liquidate but refinance, and now I understand the argument to be that the petitioner Prince at all times intended to accumulate and to use that method to accumulate a large amount of cash and then use that cash for the acquisition of the assets of the Jersey Company, which seems to me a little contradiction there.

Mr. Clark: I may not have been altogether happy in the courses that I pursued and perhaps I can make them more consistent and appear so to Your Honor as they are in my

own mind, by saying that what I intended to differentiate was a plan on the part of the petitioner,—my whole drive in this thing, what is in my head and always has been, is that the petitioner was nothing but the creature and as the Board said in the opinion, the alter ego of Prince.

Member Kern: If I could interrupt you, I think the opinion said "Prince, in corporate clothes."

Mr. Clark: There were several descriptions used which carry through the same thought better than I can express it, and with a constant emphasis on the part of counsel for the petitioner, and that having been the dividing line to a large extent as I see it between the opinion of the Board and the dissenting opinion. I say to a large extent, not entirely, certainly, but it seems to me essential to differentiate in that regard because I think it was Prince doing all of this and Prince gets his company to use just for such convenient purposes as he may see fit in the meantime and while I do think that Prince had the intention of getting this, and getting it free and clear, in 1940, what I meant was that the petitioner was not obliged to do that sort of thing, but the mere fact that the charter was expiring in 1940, and consequently that it was not reasonable to suppose that they would have to hold all of this surplus for the purpose of getting this all in.

Member Kern: There is not any contention that there was any legal obligation on the petitioner at any time?

Mr. Clark: No, I think not. I mentioned that particular disclaiming of liability on the principal of the $14,000,000 of bonds merely as an instance where the company or the corporation kept itself deliberately out of that set-up. Prince felt that he had to do all of this, wherever Prince's testimony was referred to this morning, he didn't make any reference to his company; he had to have the money in 1940 for this, and he was going to do this, and I have to do this

and I have to do that—that is what he said, and I don't want to consume the time of the Board with going further on that. I don't mean relative to your question but I mean relative to what has really been the moving impulse in my mind, that Prince just puts his hand in one pocket, and takes out something and passes it over and puts it in the other pocket and he has gotten by with practically no taxes, and the whole set-up has resulted in enormous deprivation of the Government of taxes, which from my point of view should have been paid through the distribution of surplus.

I can't cite a typical case on all fours with this, and while I know my brother is perfectly sincere in his presentation of the case, it seems to me that we can't lose a case because we have the evidence, and we have it here and it is in the record. That is, coming forward at this time and moving to complete the record in this fashion, I don't know how far you would go in taking in events which occurred subsequently to the time of the hearing. It may be customary in cases and I suppose it is in the discretion of the Board, but I had not supposed that newly created evidence after a hearing, and when a corporation is confronted with at least the possibility of having to pay a very heavy tax under 104, I would not suppose that the corporate steps taken thereafter, after the date of that hearing, could be considered as bearing or carrying any weight toward the position of the company before that date, and I would feel that it was not admissible evidence and would be improperly put in at this time.

I think except for whatever I may be able to say to you, Mr. Kern, or if you have any questions, I think that that is all.

Mr. Welch: One or two things occur to me which I would like to mention very briefly. Mr. Clark argues as to whether or not the evidence that I seek to introduce would be actually

admissible evidence if the case were reopened and entered, and on that I just can't see how there can be any doubt. The way you prove a man's intention is either from his statements of his intention or from the acts that he does and performs, which seems to reveal the intention.

Let us assume for example that I am in the possession of a deed to real estate owned by one of Your Honors, and the question of my intention to reconvey is at issue and suppose that evidence is offered and I say to my associate, Mr. Green, from year to year, I am just holding this in trust, I intend to reconvey it. And then suppose that I finally reconvey it.

The act of reconveyance is of extreme significance in supporting the existence of the intention all the way along.

Member Kern: I think that the doubt expressed by Mr. Clark and to which I for one was interested, is not with regard to the admissibility of the evidence as evidence but with regard to the timeliness of its offer, the fact that it is newly created, that the acts have been done after this case has been in the breast of the Board, so to speak, technically before the decision was out but nevertheless after the submission, the acts were done and the evidence was created.

Mr. Welch: I am moved immensely by what you say but only to this extent, it seems to me that what you say goes to the weight, and not the admissibility. I can understand Your Honor's admitting the evidence and perhaps saying, Well, maybe they just did it to be sure.

Member Opper: Isn't one of the rules about reopening cases, the motions for new trial and consideration of further evidence and so on, based on the question of whether if the evidence were admitted it would be sufficient to change the result?

Mr. Welch: Well, I think that nobody ought to come and

offer trivial evidence, and until I heard the Chairman speak just now, or a litfle ways back in the record, I thought of course the evidence was of extreme significance but now I hear what seems to me the very pointed words stated—

Member Smith: Was that the purpose of bringing in this so-called newly discovered evidence, to prove what I stated that I am sure the evidence does support, that is, I think the evidence in the record supports the proposition that Prince and his associates, if he had any, Armour, or away back before Armour got out of the Maine Company but they had it in their minds to use this company to accumulate funds whereby they could acquire the stock of Jersey Company, and also acquire enough money to pay off all of the indebtedness of not only the Maine Company but the Jersey Company and all of the other companies on up to 1940?

Mr. Welch: It all becomes so simple to me as I stand here. If the Board will simply make its finding: "We find that the purpose with which the gains and profits were permitted to accumulate was the purpose of liquidating the Jersey Company," as Your Honor now says to me you do believe—

Member Smith: What I call the liquidation of the Jersey Company, it is more than that, it is the acquisition of the shares of stock of another corporation, and now it seems to me that any holding company can do that but it does not seem to me that that is within the reasonable needs of the business within the meaning of the statute, and I so stated in the opinion.

Mr. Welch: And I argued to you this morning that I think a person can have a fantastic reason for accumulating gains and profits but as long as it is lily white and pure, and that is his real intent and he does not have the intent to avoid the imposition of the surtax, we are just out from

under this law as if it never existed, and that is the question that I wish to take to the Circuit Court of Appeals—

The only reason I am here, if Your Honor please, is I did not succeed in getting you to say in your opinion what you now say so beautifully for me and that is that you believe the intention that I urge existed but you don't think it is a tax-saving purpose. Now, I will go to the Circuit Court of Appeals on that and I will be either right or wrong. Heaven knows I think that I am right but that is all that I want to do. I will put on my hat and go out now, if Your Honor will just make that finding of fact, that the purpose for which the accumulation was made was that of buying the stock in the Jersey Company and paying its debts and owning it free and clear in 1940 and then I will go to the Circuit Court of Appeals and I will be very hopeful, and that is all that I want to do. I just want that finding of fact. It is expressed in No. 16 and No. 17 of the Motion for Additional Finding, and if I can have those two findings; then I have raised the question of law which is to me the very heart of this case.

I think that that is all, and I am delighted at the situation that I now find exists, and the Board is apparently willing to go along with me. I may not win the case in the end but I have got the intention that all of the witnesses testified to and that is what I think is the very heart of the case.

Now, there is one other thing that I want to mention and that is that Mr. Clark did point out one thing in the record that sounded to me a little as if in 1911 someone intended to keep the Jersey Company alive, and that was the covenant in the Maine bond indenture that they would do so. Now, the Chairman in great fairness pointed at once to the other clause which said the pledge hereunder of the said shares, shall not prevent the consolidation or merger of the Chicago Junction Railways and Union Stockyards Com-

pany with or the sale or conveyance or transfer of all or any of its properties to the company, meaning the Maine Company, and any such consolidation, merger or sale may be made under any laws available for that purpose.

Now, the situation that exists at the moment is to me just delightful. The trustee of the Maine bonds is in communication with my associate, Mr. Keeney and says, "We hear you are liquidating the Jersey Company," and we say, "Yes, sir," and they say, "Well, you remember this covenant about keeping it alive," and Mr. Keeney says, "You mean the one that Mr. Welch has just read," and the trustee says, "I am not sure that you have not committed a breach of the Maine indenture, and I think that I will go and hire a lawyer, and ask him," and Mr. Keeney just smiles and says, "You go and ask him, and if he comes back and tells you that we have committed a breach, I will just be amused because I can call those bonds at 105 and I would like to point out to you, Mr. Trustee, that they are five percent bonds and pretty sweet, and they are pretty rare nowadays and I think when you have talked to all of the lawyers you want to, you won't come back and tell me that you think we are in default" and then he adds one little postscript; "But believing I might run into an unreasonable trustee or my client believing that he might or an unreasonable lawyer, we did try to save our funds so that we could pay them if we had to," and they could, I think, if they had to, although I will admit not without some additional borrowing.

Member Smith: Those bonds are callable at 105 anyway.

Mr. Welch: The covenant really has no cogency, particularly when Your Honor points to the other covenant which seems to me to let them out if there is a consolidation or reorganization.

Now, just one thing more. I have been on my feet longer than you gentlemen would like to listen to me. I don't think in view of the turn the case has taken that this makes any difference, but Mr. Clark is apparently of the opinion that during the tax years in question the Jersey Company could not have been liquidated tax free.

I do not know. I am not much of a tax lawyer, although I try these tax cases, but I am just surrounded by tax experts here who tell me that there never was a time from the beginning of our tax laws, or since 1918 at least, when a company that succeeded in owning 80 per cent of a subsidiary could not by one means or another eliminate that company, close up shop, and do it tax free, and I believe those men are right. I take their word for it, and Your Honors would know more quickly than I would, and I have one thing further to say.

The cross examination of Mr. Merriman opened with my showing him a proposed tax by New Jersey on the Jersey Company, of a cool million and a half dollars a year, a property tax just for the pleasure of sitting in New Jersey and doing business, and I first tackled Mr. Merriman on that, with that, on cross examination, and as we stood there at that moment, here was New Jersey, ready then to slap on a tax of a million and a half dollars for a single year for the privilege of doing business in New Jersey, and I would say to Mr. Prince and his company if he were in that court room now, "I don't care whether it costs money to get rid of the Jersey Company or not, $3,000,000 says Mr. Clark, it is only two years of Jersey taxes," I would have gotten rid of it whether it was tax free or not, but I do say that I understand and believe the Jersey Company could have been eliminated at any time since 1918, if the Maine Company owned 80 per cent of its voting stock, and that would be tax free.

Member Opper: Mr. Welch, just one question. I don't want to keep on dragging around dead cats but coming to the question that you raised as to the possible tax result of the transfer in 1918, of that seventeen thousand odd shares of Jersey Company stock by Prince to the Maine Company, and these figures that were given to us as to how the tax results to Prince personally were negligible but if anything it increased his taxes, but how about the tax result to the Maine Company? Would it not get a deduction for the interest it paid, which it did not have before?

Mr. Welch: I believe it is fair to say yes to that.

Member Opper: Thank you.

Mr. Welch: I think that that deduction would have been 12½ percent of the amount.

Member Opper: You mean its tax rate was 12½ percent at that time?

Mr. Welch: Yes, but Mr. Green points out that it did not make very much difference because the Maine Company had nothing but dividend income anyway, which was untaxable, if Your Honors please, so that I don't think that we get very much gravy out of that 1918 sale anyway.

Member Smith: Now, Mr. Welch, do I understand that if the Board should grant this motion that you have argued this morning, you want another hearing before the Board to present the evidence, and at that time would you be ready to make any argument that you wish to make with respect to all motions that you filed?

Mr. Welch: Indeed; first, I would first offer the evidence and then argue, and clean up all of our house and Mr. Clark is anxious about our trailing on and on and I have promised not to come back again.

Member Smith: I might say, of course, that this case has had a great deal of consideration by the Board, and the opinion that was adopted was the action of the entire Board, and this request that you are making today will have to be acted upon by the Board membership, but we will try to let you know just as soon as we conveniently can as to what the action of the Board will be upon the motion, that is whether it will be granted or denied or whether further proceeding is necessary.

Mr. Welch: And in that connection, may I say that I will at my expense print a transcript of what has happened here, so that it will be convenient for use by any member of the Board?

Member Smith: I think that we will be very glad to get the copy of the transcript of this morning.

(Whereupon, at 3:15 o'clock p.m., hearing of the above matter was concluded.)

[Title omitted.]

MOTION FOR LEAVE TO FILE FURTHER AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION FOR REHEARING AND FOR FURTHER HEARING

[Filed at Hearing July 18, 1940.]

Now comes the petitioner in the above entitled case and moves for leave to file the attached affidavit of James A. McDonough in support of the petitioner's motion for rehearing and for further hearing.

/s/ JOSEPH N. WELCH,
60 State Street,
Boston, Mass.

Granted July 18, 1940

/s/ CHARLES P. SMITH, *Member,*
U. S. Board of Tax Appeals.

[Title omitted.]

FURTHER AFFIDAVIT OF JAMES A. McDONOUGH IN SUPPORT OF PETITIONER'S MOTION FOR REHEARING AND FOR FURTHER HEARING.

[Filed at Hearing July 18, 1940.]

James A. McDonough, being first duly sworn, deposes and says as follows:

In an affidavit made by me on April 12, 1940, attached to the petitioner's motion for rehearing and further hearing in this case, I stated that as of April 12, 1940, the Maine Company had acquired and owned 64,656 shares of Jersey

common and 31,563 shares of Jersey preferred and more stock was steadily being purchased.

As of July 10, 1940, the date on which the charter of the Jersey Company expired, the Maine Company had acquired and owned 64,718 shares of Jersey common and 50,879 shares of Jersey preferred. The cost of said Jersey preferred to the Maine Company was in excess of $5,000,000.

On July 10, 1940, the following plan for complete liquidation of The Chicago Junction Railways and Union Stock Yards Company (the Jersey Company) was adopted by the Maine Company at a meeting of the directors of that company:

> THIS AGREEMENT dated July 10, 1940 between CHICAGO STOCK YARDS COMPANY, a Maine corporation (hereinafter called the "Maine Company"), as party of the first part, and THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, a New Jersey corporation (hereinafter called the "Jersey Company"), as party of the second part, WITNESSETH THAT:
>
> The Maine Company is the owner of stock of the Jersey Company possessing more than 80% of the total combined voting power of all classes of stock of the Jersey Company entitled to vote, and is the owner of more than 80% of the total number of shares of all classes of stock of the Jersey Company.
>
> The Jersey Company, by operation of law, ceases on July 10, 1940 to be a going concern and to be a corporation except for the limited purpose of winding up its affairs, paying its debts and distributing any remaining balance of its assets among its stockholders.
>
> The parties hereto desire to effect the complete liquidation of the Jersey Company not later than December 31, 1940.

THEREFORE, in consideration of the premises, the parties hereto adopt the Plan for Complete Liquidation of the Jersey Company herein set forth and agree, each with the other, that in accordance therewith the Jersey Company shall be completely liquidated as follows:

1.—The Jersey Company, during the period beginning July 10, 1940 and ending December 15, 1940, will pay (a) all of its indebtedness whenever incurred which is due and payable on or before December 15, 1940 and (b) all amounts payable in liquidation to the holders of its outstanding preferred stock.

2.—All payments described in paragraph 1 shall be made in cash except that the Jersey Company may pay all debts due the Maine Company in shares of stock of The Union Stock Yard and Transit Company of Chicago (herein called the "Transit Company") at their fair value at the date of payment. Payments in liquidation of Jersey Company preferred stock shall be made as soon as possible after July 10, 1940 except that payment to the Maine Company in liquidation of its holdings of Jersey preferred stock may be delayed until the completion of the transactions described in paragraphs 1 and 4 of this Plan. All payments in liquidation of preferred stock of the Jersey Company shall be in complete cancellation and redemption of such preferred stock.

3.—The Maine Company, at the request of the Jersey Company, will loan the Jersey Company cash in such amounts as, when added to Jersey Company cash available for the purpose, will enable the Jersey Company to make the cash payments described in paragraph 2 of this Plan. For all sums so loaned, the Jersey Company will give collateral notes due December

15, 1940, and secured by 132,000 shares of stock of the Transit Company and 55,000 shares of stock of Chicago Junction Railway Company (herein called the "Railway Company"). Such collateral notes may be paid in stock of the Transit Company at their fair value at the date of payment.

4.—The Maine Company, not later than December 15, 1940, will assume and pay when due all obligations at any time accruing of the Jersey Company not paid by the Jersey Company as provided in paragraph 1, including (but without limitation) all liability of the Jersey Company with respect to Federal and state taxes at any time accruing and as guarantor of the principal and interest of $2,327,000 principal amount of the 4% bonds of Chicago Junction Railroad Company due March 1, 1945; and thereupon the Jersey Company, in consideration therefor, will transfer and assign to the Maine Company (a) shares of stock of the Transit Company having a fair value at the time of transfer of $2,000,000 and (b) all assets of the Jersey Company except the following

(1) Assets used in making the payments described in paragraphs 1 and 4 of the Plan;

(2) Shares of stock of the Transit Company not used in making the payments described in 1 and 4 of the Plan; and

(3) Shares of stock of the Railway Company.

5.—The Jersey Company, upon completion of the transactions outlined in paragraphs 1 and 4 of this Plan, will distribute its remaining assets in final liquidation among the common stockholders of the Jersey Company in complete cancellation and redemption of the common stock of the Jersey Company. All distribu-

tions under this paragraph 5 shall be made pro rata and in kind: Provided that no fractional shares of Transit Company or of Railway Company will be distributed and that whenever any Jersey Company common stockholder becomes entitled in distribution to a fraction of a share of Transit Company or Railway Company, the Maine Company will, at the option of such Jersey common stockholder, (a) either purchase such fractional share on the basis of the fair value at the time of distribution of a whole share of like kind or (b) sell to such common stockholder on the same basis that part of a share which, when added to the fraction of the share to which such stockholder is entitled, will equal a whole share.

6.—The Maine Company, at its option, may repledge as security for loans now or hereafter made to the Maine Company all or any part of the shares of stock of the Transit Company and of the Railway Company received by it as security for loans at any time made by it to the Jersey Company; PROVIDED, that the aggregate amount of loans to the Maine Company for which such shares are repledged shall not exceed the aggregate amounts loaned by the Maine Company to the Jersey Company; and PROVIDED, FURTHER, that the number of such shares so repledged shall not exceed that fractional part of all outstanding stock of the Transit Company and the Railway Company respectively that equals the fractional part of the outstanding common stock of the Jersey Company at the time owned by the Maine Company.

7.—The parties hereto, by mutual consent, may modify the Plan in any manner not inconsistent with its general purpose.

8.—This Agreement and Plan is executed in two

counterparts, each of which is an original and both of which constitute but a single instrument.

IN WITNESS WHEREOF, Chicago Stock Yards and The Chicago Junction Railways and Union Stock Yards Company have caused their respective corporate seals to be hereto affixed and this Agreement and Plan to be executed by their respective officers thereunto duly authorized, as of the day and year first above written.

On July 11, 1940, said plan was adopted by the Jersey Company and its liquidating trustees at a meeting of the directors and liquidating trustees of that corporation.

On July 11, 1940, the above set forth agreement constituting said plan was executed and delivered by the Maine Company and the Jersey Company.

On July 11, 1940, as provided in paragraph 2 of that plan payments in liquidation of Jersey Company preferred stock were made in cash to all holders of such stock except the Maine Company. In order to enable the Jersey Company to make such payment, the Maine Company loaned to it the sum of $500,000.

JAMES A. McDONOUGH.

THE COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. JULY 15, 1940.

Subscribed and sworn to before me this 15th day of July, 1940.

JOSEPHINE A. KRAFT,
Notary Public.

[SEAL.]

My commission expires March 24, 1945.

[Title omitted.]

ORDER.

[Dated September 21, 1940.]

On April 18, 1940, the petitioner filed a "Motion for Rehearing and Further Hearing" on the ground of newly discovered evidence. Hearing thereon was heard by a special Division of the Board consisting of three members on July 18, 1940. At such hearing it appeared that the purpose of the filing of the motion was to introduce into the record evidence that after the original hearing measures had been actually taken to liquidate the New Jersey Company, upon the expiration of its charter on July 10, 1940. The Board being of the opinion that the evidence sought to be introduced is not newly discovered and is immaterial to any issue in this proceeding, for reasons stated in a Memorandum Sur-Order attached hereto, it is ordered that the motion be and the same is hereby denied.

It is further ordered that the petitioner's motions "to Modify Findings of Fact and for Additional Findings of Fact," and "for Further Hearing," filed April 18, 1940, be set for argument before a Division of the Board on October 1, 1940, at 10:00 a. m., in Hearing Room No. 2.

Reviewed by the Board.

STERNHAGEN, VAN FOSSAN and LEECH dissent.

(signed) CHARLES P. SMITH,
Member.

[SEAL]

UNITED STATES BOARD OF TAX APPEALS

Docket No. 83797.

CHICAGO STOCK YARDS COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

JOSEPH N. WELCH, ESQ., EDWARD J. KEELAN, JR., ESQ., LAWRENCE E. GREEN, ESQ., JOSEPH K. MOYER, ESQ., and FRANCIS B. KEENEY, ESQ., *for the petitioner.*

PHILIP M. CLARK, ESQ., and STANLEY B. PIERSON, ESQ., *for the respondent.*

MEMORANDUM SUR ORDER.

SMITH: Counsel for the petitioner, on April 18, 1940, filed three motions in the above-entitled proceeding promulgated March 20, 1940, 41 B. T. A. 590. One was headed "Motion to Modify Findings of Fact and for Additional Findings of Fact"; a second one, "Motion for Rehearing and Further Hearing"; and a third, "Motion for Further Hearing." The three motions were set for argument on July 18, 1940, and a Division of the Board, consisting of members Kern, Opper, and Smith, was appointed by the Chairman to hear the argument.

At such hearing counsel for the petitioner chose to argue only the second motion, referred to above, for the opening of the proceeding to receive evidence that the charter of the New Jersey Co., which expired on July 10, 1940, was not renewed and that steps were actually being taken to liquidate the company.

The motion was opposed by Government counsel upon the ground that the evidence was not *newly discovered evidence* since it related to events which occurred after the

hearing and for the most part after March 20, 1940, the date of promulgation of the Board's opinion, and that the evidence sought to be introduced was immaterial to any issue raised by the petition.

In our opinion in that case we said, 41 B. T. A., page 623

> Although Prince testified that under his program it was contemplated that the Jersey Co. would be liquidated in 1940, there appears to be no necessity for its litigation and many reasons why it probably will not be liquidated. When the petitioner was organized in 1911, an issue of $14,000,000 bonds was provided for. The petitioner covenanted with the trustee that it would do all that was necessary for it to do to continue the existence of the Jersey Co. The outstanding bonds of the petitioner are callable at 105, but if they are not called and paid off the petitioner is under obligation to continue the existence of the Jersey Co.

The above paragraph of our opinion is the basis for the motion for a further hearing of the case on the ground of "newly discovered evidence." The above-mentioned paragraph forms no part of the predicate for the conclusion that the petitioner is liable to tax under section 104 of the Revenue Acts of 1928 and 1932 for the years 1930, 1932, and 1933.

There is evidence in the record that Prince contemplated the possibility prior to 1920 of the dissolution of the New Jersey Co. upon the expiration of its charter on July 10, 1940. There is also evidence that he acted consistently with this possibility. The record also shows that the petitioner had bonds outstanding which mature in 1961 and that it had contracted to continue the existence of the New Jersey Co. until those bonds were all paid off, and that some time prior to the date of hearing Prince, or somebody for him, had obtained the opinion of counsel as to whether the charter of the New Jersey Co. could be extended provided such extension seemed desirable.

Dissolution of the New Jersey Co. was a contemplated possibility, which is recognized in the opinion, and purchase of that company's securities might facilitate such dissolution if it eventuated. But we made no finding of fact on these points because in our view that was the most that could be said and that could not be of any significance in reaching our ultimate conclusion. The proposed evidence adds nothing to the previous record in this respect. Dissolution was a possibility, and it is asserted that it has happened. It was not inevitable. Even as to prior intention, the proposed evidence is no persuasive guide. A man might easily do the unintended; and perhaps more so if he thought to benefit a case already heard and in process of decision.

The question arises as to the advisability of the Board granting a rehearing in a case to show facts which became facts after the original hearing and after the Board had promulgated its opinion. Such action seems even less desirable since such facts are the result of action by petitioner, the interested party, and are thus similar to self-serving declarations made long after the event, which the interested party now asks us to treat as sufficient to counteract our previous conclusions.

Although the motion is for the introduction of "newly discovered evidence" it is quite apparent that the evidence sought to be introduced is not newly discovered. It relates entirely to facts which could not have been introduced in evidence at the date of the hearing. The Board being of the opinion that the so-called newly discovered evidence is incompetent and immaterial to any issue before the Board, the motion is denied.

Reviewed by the Board.

STERNHAGEN, VAN FOSSAN and LEECH dissent.

Entered Sept. 21, 1940.

[Title omitted.]

REPORTER'S MINUTES.

[Filed October 15, 1940.]

Hearing in Hearing Room No. 2, Internal Revenue Building, Washington, D. C., on the 1st day of October, 1940, at 10 o'clock a. m.

The above-entitled matter came on for hearing on this the 1st day of October, 1940, before a Division of the Board comprising the following Members:

Honorable Charles P. Smith
Honorable John W. Kern
Honorable Clarence V. Opper

pursuant to notice of hearing heretofore given; whereupon the following proceedings were had and argument heard, to wit:

Appearances:

Joseph N. Welch, Esq., Edward J. Keelan, Esq., and Lawrence E. Green, Esq., (Hale & Dorr, 60 State Street, Boston, Mass.)

Joseph K. Moyer, Esq. (1343 H Street, N.W., Washington, D. C.) and

Francis B. Keeney, Esq. (Swan, Keeney & Smith, 1310 Turks Head Building, Providence, R. I.)

on behalf of Petitioner.

Philip M. Clark, Esq. and Stanley B. Pierson, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue),

on behalf of the Commissioner of Internal Revenue, Respondent.

PROCEEDINGS.

The Clerk: Docket No. 83797, Chicago Stock Yards Company.

For the petitioner, Mr. Joseph N. Welch, Mr. Lawrence E. Green, of 60 State Street, Boston, and Mr. Joseph K. Moyer, of 1343 H Street, NW, Washington, D. C.

For the respondent, Mr. Philip M. Clark, and Mr. Stanley B. Pierson.

Member Smith: Proceed.

Mr. Welch: And for the petitioner, Mr. Francis B. Keeney, of Providence, Rhode Island.

The Clerk: That is right.

STATEMENT ON BEHALF OF THE PETITIONER.

Mr. Welch: May it please Your Honors, first, a pure formality in connection with the denial by the Board of the motion to be allowed to introduce further evidence.

I have prepared an offer of proof, and wish to file it. I shall make no reference to it other than to make it a part of the record, so that it may, if need be, be taken to the Circuit Court of Appeals.

Member Smith: It may be received.

Mr. Welch: I now proceed, if Your Honors please, to the "Motion to Modify Findings of Fact and For Additional Findings of Fact," and if agreeable to the Board, I will take up seriatim the requests for changes, additions and modifications.

In so doing, it will be necessary to cover the case as a whole, and the consequence is, as I argue that motion, I say to Your Honors all that I have to say this morning.

When we met last time, some question was raised as to the probable time I would take. I am almost totally unable to make a statement, I guessed so badly the other day.

But I would be happy and comfortable if there would be an indication from the Bench. My guess is that I would be likely to run through the morning and perhaps even into the afternoon.

Member Smith: I rather expected that. I think there will be no question as to the time.

Mr. Welch: Thank you, sir.

I then turn to the motion which is headed "Motion to Modify Findings of Fact and For Additional Findings of Fact," and I am assuming each Member has a copy before him.

Member Smith: That is correct.

Mr. Welch: The first additional finding of fact is a purely formal one. It is that you simply find as a fact that everything contained in the stipulation is true. It is a pure formality. I am perhaps over-tender about it, but I would be obliged if that finding could be made, so that there never could be any discussion as to whether those facts stipulated are facts.

Member Smith: Is there any objection to that finding?

Mr. Clark: I can't think of any, Your Honors.

Mr. Welch: What I have said about No. 1 will apply equally to No. 2. Am I correct in thinking that, Mr. Clark?

Mr. Clark: Just a moment, please.

In that regard, Your Honors, that is relative to the deduction of $221,000 odd. I think in that connection the Board's opinion on page 1, stating that

> "All issues have been settled by stipulation except one arising from respondent's determination that petitioner is subject to tax under Section 104 of the Revenue Acts of 1928 and 1932."

covers that. And in the computation filed by the respondent on April 5, 1940, this deduction has been allowed to the

petitioner. I don't see why that should be found as a fact, specifically.

Mr. Welch: Certainly it could do no harm. It is agreed between us that it is a fact which should be found, and perhaps I am over-tender in wanting to be sure that the record is entirely clear.

Mr. Clark: It is certainly true that you are entitled to this deduction, and it has been so recognized in the computation, and the Board has recognized there is no other issue except as stated, and it would seem to me it would be surplusage to put it in again.

Member Opper: Supposing that were a disputed question, could that be a finding of fact? Isn't that really a statement of the ultimate legal conclusion which, if this were not an agreed result, you would be litigating, and you would be litigating it partly as a matter of law?

Mr. Welch: Well, it seems to me we are having a difficulty about something that actually presents no difficulty.

Member Opper: I agree, but since you are asking to have a finding of fact made which is rather a question of bringing to the attention of the Board, if it were unaware of it, that the parties have agreed to a certain result, that is that they have withdrawn from the consideration of the Board a certain issue.

Mr. Welch: I suppose what impelled me to ask this is that on page 33 of the opinion, the Board did find as a fact a similar situation; and I think, to be consistent, this matter should be found. I don't think it is useful to take either time or energy to discuss it, and nobody is going to feel badly, however it comes out.

But I might put it this way, that I would feel somewhat happier if the Board did make the finding.

Member Smith: Well, it is true anyway, except as to

the number of shares. That "305", I take it, should be 3,050.

Mr. Welch: That is correct, Your Honor.

Member Smith: Then we will pass that and go to the third one.

Mr. Welch: I then pass on to No. 3.

What I have suggested there is again something that is not extremely exciting to me, but the testimony was clear to that effect, and the statement that I have suggested is a finding of fact which is, I am confident, entirely accurate. And, once more, I should think it unlikely that Mr. Clark would oppose that finding.

Mr. Clark: Well, of course, I do oppose it, Your Honor. The finding requested is not justified. The investment in Pau Corporation does not appear on the books of the Maine Company, in the first place. No consolidated returns were filed by the Maine Company, including the business transactions of Pau Corporation, and there isn't any evidence introduced that F. H. Prince and Company, or Prince, himself, rendered an accounting to the Maine Company. I see no basis for petitioner's request.

Mr. Welch: Once again I have more important things to say to Your Honors than to argue about this. If you will look at the reasons suggested in the motion for the finding, I am content—and if you will look at the record, I think it is fair of me to ask that the finding be made, and I do so request.

Mr. Clark: There was a self-serving declaration to that effect.

Mr. Welch: Much evidence, Mr. Clark, in law suits, is self serving. That cannot be otherwise. That is no criticism of the evidence or no statement that the evidence does not appear in the record.

No. 4 is again something that is perfectly clear from the

record. It has to do with this write-up. It seems to me fair in a case of this sort that a write-up of so large a sum should be reflected in the findings by the Board. I say that for the reason you cannot pay liabilities with book assets. You can only pay them with realities. And if and when this case reaches the Circuit Court of Appeals, I think a somewhat fairer picture of the petitioner's situation is exhibited to that Court if this finding is made. And it is for that reason, therefore, that I do request this.

Mr. Clark: Your Honor, I am going to ask Mr. Pierson if he will speak to the Board relative to this point because I think he is better equipped than I in that regard.

Mr. Pierson: In that connection, if Your Honors please, the finding of the fact of the Board in this regard already discloses that the figures contained therein in Paragraph 22-B are taken from the consolidated return for 1929, which was filed by the Jersey Company, that is, as the statement of facts now stands.

The write-up amounting to more than thirteen million dollars, which is referred to in this request, is only one of a series of agreed adjustments, the net result of which as reflecting the excess of assets over liabilities of the consolidated group, does not equal the thirteen million dollars, as requested by the petitioner.

And in that connection, there were agreements entered into between the parties, and the stipulation, which was made the subject of a compilation as contained in Respondent's Exhibit D. And this request standing alone for the adjustment or showing of the thirteen million dollars should not be made unless all of the adjustments that were agreed to by the parties are agreed to in the findings of fact.

Mr. Welch: I think the answer to the suggestion is that we ought to accede to that portion of the new findings, so to speak, suggested by Mr. Pierson, and we do so.

Mr. Pierson: And, further, in that connection, that respondent's experts testified to the fact that the assets of the Jersey Company and its subsidiaries had a fair market value which was greatly in excess of that reflected by the books and or the returns as adjusted. And that, likewise, should be reflected in any adjustments regarding the excess of assets over liabilities.

Mr. Welch: Now, the suggestion in respect to Paragraph 5, of the motion, has, I think, been covered by what both of us have said in respect to No. 4.

Mr. Pierson: That is true, Your Honor. That is merely a carry-through to the later years.

Mr. Welch: The next is a request that the Board add to its finding No. 22 the new paragraph that is set out in the motion.

Could I inquire at this point whether or not the copies of the motions that the Board are working from have a flyer pasted on to the top of page 5?

Member Smith: That is correct.

Member Kern: And at the bottom of page 4.

Mr. Welch: And the same at the bottom of page 4.

Member Smith: Is it not true, Mr. Welch, that the liabilities are in the amount of $27,528,781.93, instead of $29,528,781.93, and that the excess of assets is $38,000,000 instead of $36,000,000? That was checked out by me, I think, and found to be the fact.

Mr. Welch: If so, that is quite all right. It so happens that the preparation of this particular section of the motion was done in Washington, with some data we wanted being in Boston, and unavailable to us; and Mr. Green and I are not happy with the original mistakes. I am content with the suggestion Your Honor makes. I have no doubt it is correct.

Member Smith: Is there any objection to that finding?

Mr. Clark: No. Well, now, I didn't understand Your Honor. Perhaps I thought it was relative to the change in the figures.

Member Smith: No I meant the entire finding.

Mr. Clark: No. Mr. Pierson will handle that, too.

Mr. Pierson: In this connection, if your Honor please, it seems to the respondent that the financial structure of the Jersey Company and its subsidiaries is really immaterial to the question here before the Board.

I might point out that the Maine Company throughout the years 1930 to 1933 held an interest of approximately 33 1/3 percent in the book value of the assets of said companies. But as our position has always been throughout here, the business of said companies was not the business of the Maine Company. And as pointed out in the Board's decision on page 32 (41 B.T.A. 620), after noting the financial structure of the Jersey Company and its subsidiaries at December 31, 1929, it cites the case of the Keck Investment Company in support of the position. It would seem that the situation as of December 31, 1933, is not material to our issue here.

Member Kern: You have no question as to the accuracy of the figures? Your position is that the whole finding is immaterial?

Mr. Pierson: In that connection, I might state that should the Board decide this data with respect to December 31, 1933, be included in the statement of facts, then the data regarding the thirteen million dollar adjustment should likewise be carried through to reflect in these figures contained in the request, that is, carry that write-up and adjustments as requested in Respondent's Exhibit D and likewise carry on through to December 31, 1933.

Mr. Welch: I am content that they should.

Mr. Pierson: With respect to the last paragraph contained in No. 6, I would like to state that the Maine Com-

pany here seeks to have the Board find that the enterprise needed at least $5,000,000 cash as working capital. It is noted from the record that in the year 1933 the Jersey Company paid out in cash dividends more than two million dollars and at the close of the year the Jersey Company and subsidiaries had less than $1,361,000 in cash. And it would therefore seem to respondent that if the Jersey Company and its subsidiaries needed $5,000,000 in cash, it would have to withhold the entire dividend distribution in 1933.

So I really don't believe that that last paragraph is warranted.

Mr. Welch: In that connection, Your Honors, you will hear me saying a great deal more, before the morning is over, about that huge dividend declaration when there were not, in fact, any earnings in the Transit Company.

The answer to the need for the $5,000,000 in working capital was that it was the view of Mr. Prince, the man who ran the Maine Company, that the Maine Company was the banker, and the money could be advanced to the subsidiary companies. The evidence from all quarters was that at least $5,000,000 working capital in the enterprise somewhere was necessary, and that is all we seek to have found.

I now pass to No. 7. No. 7 has to do with the transactions in coming to the rescue of the Chicago banks. The testimony was clear that it was known at the time that a huge portion of the roughly ten million dollars would be lost, and it is, I think, fair to the petitioner's case that that should be found as a fact.

Mr. Clark: Well, I think, Your Honors, in that regard there isn't any evidence showing us what portion, if any, of this loss would be borne by the Maine Company. And the losses that actually occurred and were substantiated have

been recognized by the Board in its finding in Paragraph 23, I think.

There isn't any showing of the net amount that would be lost after December 31, 1933.

In Paragraph 23, of the findings, the first full paragraph at the top of page 11 (41 B.T.A. 600), there is a recital relative to this. I don't think that it is necessary to read it, unless Your Honors care to have it read into the record.

Well, in fact, I think all the Paragraph 23 material applies, but especially what I referred to as the first full paragraph at the top of page 11 (41 B.T.A. 600).

Member Kern: I take it, then, you object to the adding of this as a finding?

Mr. Clark: Yes, sir; I do. It seems to me immaterial.

Member Kern: Immaterial, but not inaccurate.

Mr. Clark: Well, it goes to a question of anticipation, Your Honor. I don't quite see why anticipation at this time plays a part. The accuracy of the figures is spelled out by the Board in its findings, under Paragraph 23.

Member Opper: Wouldn't the anticipation of the future liability have some effect on the reason for the accumulation?

Mr. Clark: Well, it might, Your Honor. I am not quarreling too much with that.

Member Smith: Let us pass to No. 8.

Mr. Welch: No. 8 is, of course, very simple.

Member Smith: And may I ask if there is any objection to that No. 8 finding?

Mr. Clark: Just a moment, Your Honor, until I locate it.

Member Smith: The figures are unquestionably correct and I omitted to put them all in, for all of the years, because I didn't think they were necessary.

Mr. Clark: Mr. Pierson may have some comment on that. I think we have no particular objection.

Mr. Pierson: I believe, as Your Honor states, the figures contained therein are correct, but in that connection, whatever reduction of indebtedness there was prior to 1922—that is, Your Honor's findings start with the year 1922—has been found by the Board in Paragraphs Nos. 14 and 15 with regard to the transactions entered into between the petitioner and the Maine Company and the Armour Company, all of which tended to reduce the indebtedness in the early years prior to 1922. But there is no question as to the figures contained therein, but what they are correct.

Member Opper: Mr. Welch, I unfortunately have here a copy of the opinion which is published in the other edition, and I wonder whether you would read to me the first few words of that sentence beginning at the bottom of page 11 (41 B.T.A. 600)—Which paragraph is it?

Mr. Green: In the paragraph beginning at the bottom of page 600 and continuing at the top of page 601 of your version.

Mr. Welch: Would Your Honor permit me to look at your copy to see just what we have to deal with?

(Discussion at the bench off record.)

May I say this for the record, that Mr. Green and I have appreciated the fact that there might be some difficulty about the paging, and we are prepared to make the record sensible to Your Honors in some way. It occurs to me, however, that when this record of today is printed, we may take the liberty of inserting a different system of paging so that other Members of the Board will not have any difficulty in following what we do say here.

Member Opper: I do think, for example, in foreseeing the effect on the Circuit Court of Appeals, it will be simple for them to refer to the paging in the volume, because the probability is that they won't have the other copy.

Mr. Welch: And when the record is printed, I will do

such editing as is necessary to make it sensible for them.

I would like at this point to inquire, is it going to be a fact that each Member here sitting is going to work from the copy identical with that which Member Opper is using, or is anybody using the little pamphlet which came down, which I happen to be using?

Member Kern: I think I will be using the same type Mr. Opper is.

Member Smith: It doesn't make any difference. I have both of them here.

Member Opper: Well, I am sorry to interrupt.

Mr. Welch: I appreciate it, because this is a difficulty with which I knew we were faced, and I wanted to make the record sensible.

No. 9 has to do with finding of fact No. 24. There isn't much that I wish to say prior to having heard from the other side on this. The suggested changes that I make, it seems to me, are entirely in line with the uncontradicted evidence. I am particularly allergic to the statement that the loans were used by Prince for any purpose desired by him. I can't quite believe that the majority thoughtfully meant to say that about the loans. They were all made for perfectly definite purposes, and only that trivial $160,000 loan was made for any purpose desired by him, meaning Mr. Prince. This suggested change was prepared by counsel, prayerfully and thoughtfully. And we do think it presents a somewhat fairer picture of the loans to anyone who may hereafter look at this record, and we respectfully request that this be said in the findings of fact.

Member Smith: Mr. Clark?

Mr. Clark: Well, I think, Your Honor, that what petitioner's counsel asks the Board to do is to adopt practically the statement of findings as made by the Member who wrote the dissenting opinion. I think the Board has found relative

to this, and there is ample evidence in support of it, as appears in Paragraph 24 at page 12 (41 B.T.A. 601) of the opinion. I don't want to go into it in detail. Your Honors have considered all this before.

There is one further thing I would like to mention, Your Honor, and that is that it appears in the record that Maine Company charged interest on the loans to Prince, and that Prince paid interest on those loans and deducted it in his income tax returns, which, it seems to me, has a definite bearing. And he didn't make any accounting to the Maine Company for it, for those transactions.

That is all I have to say.

Mr. Welch: No. 10, of course, on its face, has to do with finding No. 34. The reasons that we request the finding must, I think, be obvious. The evidence was undisputed and clear, and I think there is really nothing I can add to the reasons that were suggested in the motion as to why the finding should be made.

Mr. Clark: I don't see that it is material, Your Honor. I don't see any materiality to it as to what happened after the sale by Prince to the Maine Company, wherein he had benefits by the deduction of losses in his income tax returns without parting with the beneficial interest. It seems to me wholly irrelevant. That is the only comment I would have to make.

Mr. Welch: I would go along with Mr. Clark if he would say the whole subject is irrelevant, as I think it is, under Your Honors' decisions. I am content if you would leave the whole thing out and not say anything, but if you do say some things, I only beg of you to be fair to me in regard to the fact that the transaction did not hurt the program of the Maine Company, but, in the last analysis, favored the program.

Mr. Clark: My objection to materiality, Your Honors,

comes only relative to what transpired after the sale by Prince to the Maine Company.

Member Smith: You are not questioning the accuracy of the proposed finding, Mr. Clark?

Mr. Clark: No, sir.

Member Smith: We will hear the next one.

Mr. Welch: The next one is a suggested rephrasing of the finding of the majority in regard to how the bank crisis situation was handled in Chicago. I am going in another section of my argument to handle or to deal more pointedly, and I trust more powerfully, with the suggestion that whatever happened in Chicago was the act of the Maine Company.

I would like it if Your Honors would, when I refer or when I reach that point in my argument, by reference, so to speak, apply it back here. But I will say at this point that the suggested finding seems to be entirely in accord with the record, and that the reasons there suggested are cogent and sufficient to support the request.

Mr. Pierson: In that connection, it seems to respondent that the substitution of this material in lieu of that already contained is not warranted for the reason that the only evidence in support of this request is a self-serving declaration made by Mr. Prince and his subordinates.

In that connection, respondent introduced into evidence documentary evidence in the form of returns which show business salaries and everything paid to the respective officers of the different corporations. And had the Maine Company handled the stockyards banking situation and the stated activities of the Jersey Company and its subsidiaries involved, including, as they did, traveling expenses and telephone calls and personal services and disbursements and charges for such service, and had they been made with the Maine Company, they would have ap-

peared as claimed deductions from that company's gross income. All this was argued by respondent at the time the brief was filed. The return of the petitioner in this case reflects nothing of that sort of deduction, and the Board has found as a fact in Paragraph 29 that the expenditures made by petitioner in the years 1930 to 1933, inclusive, that they are already set forth in the Board's findings of fact.

And, furthermore, Mr. Prince was paid salaries by the stockyards group as set forth in the Board's findings in Paragraph 35, in amounts of approximately $48,000 annually.

The consolidated income tax returns of the Jersey Company and its subsidiaries further disclose that Prince was devoting the majority of his time to these companies, to the apparent exclusion of any services rendered to petitioner. And the consolidated returns of the Jersey Company and its subsidiaries further disclose that very large salaries were paid to the officers and directors of those companies for the management of those companies.

And it seems to me that it is unwarranted to include these conclusions in the findings which, as I see it, are contrary to the evidence in the record.

Mr. Welch: I would just like to say one word in response to that. The Commissioner of Internal Revenue allowed as a deduction on the Maine return a salary of $50,000 a year to Mr. Prince for what he did as an officer of that concern. It seems to me totally impossible for any one to stand in this court room and say that that very substantial reduction could have been allowed on that return unless the Commissioner well knew that Mr. Prince's activities in the Maine Company were sufficient to support a salary of that size. It happens to be that his salary in the Maine Company was greater than the sum of all his other salaries. And, as I have said to Your Honors a moment ago, when

I reach another section of my argument, I hope I shall be able to demonstrate on the argument, on the whole question, that the activities of the Maine Company in Chicago, not only in the banking situation, but everything else were serious and important and large in volume.

I assume that we should proceed to No. 12?

Member Smith: That is correct.

Mr. Welch: No. 12, once more, is a suggested change in a finding entirely in conformity with the testimony and it seems to me somewhat fairer to the petitioner than the finding that is now made. Because of the fact that it does conform to the testimony and because it seems to me fairer, I respectfully request that the substituted finding be made.

Mr. Pierson: In that connection, Your Honors, I think the argument that has been advanced with regard to issue No. 11 applies with equal force to No. 12.

Mr. Welch: On both 11 and 12 I think I want only to say that I would appreciate if Your Honors would look carefully at the record and at the motion and at the reasons for it, and I hope that you will reach the conclusion that what I suggest is fair. If you don't, I shall not die of despair. I don't think it is extremely important, and not so important as what I will deal with later and what I have to say this morning.

And, on the other hand, it is distinctly and sufficiently important so that if, as I have meant to do, I have stated it fairly, I should like to have you grant the request.

No. 13 is quite simple and the reasons for it must be obvious. I think I need not say anything in support of that.

Mr. Clark: It seems to me, Your Honors, this has been discussed and disposed of by the Board in the opinion of September 21st. I haven't anything further to say relative to it.

Mr. Welch: No. 14 was something that was perfectly

clear on the testimony of the experts of both sides, as I pointed out when I was here before, and it seems to me to be an important finding of fact that I should have.

Mr. Clark: That likewise seems to me was dealt with by the Board.

Mr. Welch: No. 15 is a formality. It is, of course, a cornerstone of the petitioner's case, and since it is a cornerstone and so obviously true, I would appreciate it if it were made as a finding of fact.

Member Smith: If that finding of fact is made, of course the conclusion reached by the Board is not correct?

Mr. Welch: Not formed for the purpose.

Mr. Pierson: In that connection, if Your Honors please, I think the Board has treated with that true not in its findings of fact, but at page 25 (41 B.T.A. 613) of the opinion it is stated:

> "The petitioner was formed in 1911. It clearly was not formed for the purpose of preventing the imposition of the surtax"—

and that has been already treated by Your Honors.

Mr. Welch: The answer to that is that we consider it so fundamental we will be happy to have it made as a finding of fact.

Mr. Clark: There has never been any question about it, if your Honors feel it should be found.

Mr. Welch: Nos. 16 and 17 I wish to treat together. There is substantially nothing I wish to say in respect to them today. The whole ground was covered at the time of the last argument. I would like merely to say that as far as the language is concerned, particularly in No. 17, I

would be equally content if we took the language of the Presiding Member as it appears on page 89 of the record of the last hearing. To remind Your Honors of it, that is where the Presiding Member said:

> "I have no doubt that Prince had the idea—I think it was plain all through this testimony—that it was his idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares to pay off not only all of the bonds of the Jersey Company in or before 1940, but all of the indebtedness of all of the other corporations."

And so I say to your Honors that I want the substance of Nos. 16 and 17, if I may have it, and I will be happy if Your Honors will take my words and not unhappy if you take the words of the Presiding Member.

Mr. Clark: I will leave that to the Board. I have no comment to make.

Mr. Welch: In connection with No. 18, I should like to be allowed to hand to the stenographer a little chalk that has been made from the testimony in the case and ask that it appear in the record at this point—and I will furnish a copy to each of Your Honors—purely to make what I say somewhat clearer, (distributing copies of tabulation in question). This chalk is made from exhibits in the case.

The tabulation referred to is as follows:

SCHEDULE IN CONNECTION WITH REQUESTED ADDITIONAL FINDING OF FACT #18

(1) Year	(2) Net Earnings of Jersey Co. and Subsidiaries	(3) Dividends to Others Than Petitioner	(4) Net Earnings Available for Dividends to Petitioner	(5) Dividends Paid to Petitioner	(6) Excess of Dividends Paid to Petitioner Over Available Earnings of Jersey Co. and its Subsidiaries
1922	2,519,045.56	498,661.49	2,020,384.07	1,919,838.51	100,545.56
1923	2,837,991.33	471,207.00	2,366,784.33	3,151,080.45	784,296.12
1924	2,683,325.83	469,773.75	2,213,552.08	2,048,726.25	(164,825.83)
1925	2,555,540.26	466,926.05	2,088,614.21	2,156,715.12	68,100.92
1926	2,526,654.56	460,650.00	2,066,004.56	2,573,429.13	507,424.57
1927	1,902,879.78	458,318.25	1,444,561.53	1,961,309.01	516,747.48
1928	2,660,140.22	450,940.85	2,209,199.37	1,971,080.89	(238,118.48)
1929	2,351,949.67	448,025.25	1,903,924.42	2,423,901.18	519,976.76
1930	2,566,502.48	443,028.75	2,123,473.73	1,978,829.21	(144,644.52)
1931	2,289,144.96	436,872.00	1,852,272.96	1,988,779.35	136,506.37
1932	3,725,825.26	428,987.25	3,296,638.01	1,991,865.19	(1,304,772.82)
1933	(113,182.39)	452,412.00	(538,594.39)	1,948,088.10	2,486,682.39
Total	28,505,617.52	5,458,802.64	23,046,814.88	26,113,642.30	3,066,827.42

Explanation of Sources of Figures and Computations on Schedule.

(2) Sources:

For 1922-1926, Incl. Exhibits S-3, S-5, S-8, S-12, S-14, S-26, S-34
1926-1930, " " S-3, S-5, S-8, S-12, S-26, S-34
1931-1933, " " S-3, S-5, S-8, S-12, S-26, S-34, S-36

Intercompany dividends eliminated.

(3) Source: Exhibit S-28.

(4) Column (2) minus column (3).

(5) Sources:

Total dividends paid by Jersey Co. from Exhibit S-26 minus figures in column (3) of this schedule. The figures in column (5) will not agree perfectly in all years with dividends received by Maine Co. per Exhibit S-31, because in some years dividends paid by Jersey Co. at end of year were not taken into income of Maine Co. until the next year.

(6) Column (4) minus column (5).

Mr. Clark: Will you pardon me if I interrupt just a moment?

Are you addressing yourself, Mr. Counsel, to No. 18 at the present time?

Mr. Welch: Yes, Paragraph No. 18.

And the chalk that I have handed to Your Honors shows that from 1922 to 1933, one year over a decade, the Maine Company withdrew from this enterprise more than the enterprise produced in earnings. There isn't any dispute about it, but it seems to me an important finding of fact, and Your Honors will quickly see why I think it is important.

So that simple finding of fact No. 18 should, I think, be made, and it is one about which I am rather deeply anxious.

Mr. Clark: I think, Your Honors, that the finding of fact as requested, standing alone, doesn't give a clear picture. The record may support the fact that the Jersey Company and its subsidiaries declared dividends in excess of their earnings for some particular year or years. But it also shows those dividends were received in part by the petitioner and used by it in acquiring common stock of the Jersey Company and in making loans to its sole stockholder and in investing in other assets.

This hasn't any bearing except in a negative way, on the intent of accumulating earnings to avoid the imposition of surtax. And, aside from that, as petitioner has drawn his request for this additional finding, it is to the effect that petitioner withdrew from the Jersey Company and its subsidiaries, which would seem to carry the meaning and inference that the petitioner handled the Jersey Company as I so said, and was in control of it; but that wasn't the case during these years.

So I think petitioner's request is unwarranted and should be denied.

Member Kern: Is your suggestion, Mr. Clark, that it should be denied entirely, or that this finding should be

made plus explanatory findings which you think would state the picture more clearly?

Mr. Clark: Well, I think it should be denied, Your Honor. Of course, if it were so found by the Board, it should in all fairness carry with it the explanatory details which I have stated and which I think are unquestionably borne out by the record. And Mr. Pierson calls to my attention that if this is granted, a similar statement should be made relative to the years from 1911 to 1922, inclusive.

Mr. Welch: I now come to the three most critical motions or segments of this motion, each one of which will take considerable time and argument. And for purely personal reasons I would be pleased if we might have a very short recess before I go into those motions.

Member Smith: Yes, we will take a brief recess.

(Brief recess.)

Mr. Welch: I now address my remarks to Paragraph 19 of the petitioner's motion which is the motion that the Board strike out its finding that the Maine Comapny is a mere holding company and substitute what I suggest is the correct finding, that it was not a mere holding company.

I find myself in this position, if Your Honors please, I have the pleasure of addressing the three Members of the Division and I have the duty, so to speak, to send a message to the other thirteen Members of the Board who are not here. That is, I know they will do me the kindness and courtesy of reading what I say. And because I am addressing some men other than yourselves, for just a moment or two I will, I fear, bore you slightly.

I want to state very briefly a history of the enterprise with which we are here dealing. The enterprise began with a single company, the Transit Company. It was formed in 1865, just after the Civil War, and as a single company it operated the stockyards and it ran the railway and it ran

a light and power plant. Its charter was a legislative charter and limited it in its borrowings to the sum of $500,000;—— and that has never been changed.

That simple, single situation continued along until the Jersey Company appeared. That company appeared in 1890. It was, as we all know, a Jersey company and it was formed under the Jersey Corporation Law of 1875, which had, however, been amended in 1889 to permit a holding company situation. As far as I know, New Jersey was the earliest state which would permit a corporation to be formed to hold the stock of another corporation. And I have always assumed that New Jersey was chosen as the state in which to incorporate what we call the Jersey Company because, as far as I know, it was the earliest state available in which that could be done.

The reason for the formation of the Jersey Company is, I think, well known, certainly, to the three Members on the Bench, and probably to all the Members of the Board. It was formed for this reason. The packers had become jealous of the fact that the Transit Company was making a good deal of money in Chicago. They said to themselves and, indeed, to the Transit Company:

> "You fellows wouldn't amount to anything if it weren't for the presence here of the packing industry. We are really making your money, and we want a portion of it."

And they threatened to move away and they even went over into Indiana and bought a tract of land and pointed proudly to it and said, "This is where we are going to move."

And the Transit Company became frightened and decided it must do something to get the packers to remain in the vicinity of the yards. And what it did was this: It incorporated this Jersey Company to hold the stock of the

Transit Company under an arrangement whereby sums of new capital could be secured, and under an arrangement whereby bonds could be issued, and it secured funds with which it could, and did, placate the packers.

And the packers at that time were given some $4,000,000, as I remember, in bonds of the Jersey Company, and they solemnly signed up an agreement in which they said they would remain at the yards and quit this ugly talk about moving away.

And that, as Mr. Green reminds me, was for a definite period of years, fifteen years.

Now, I have a note of what the Jersey charter provided, and I think it is interesting to look at. It appears in Exhibit S-16, and I am reading only an excerpt.

The Jersey charter stated that the corporate purposes of the Jersey Company, among other things, were to purchase, hold, pledge, transfer, sell or otherwise dispose of, or deal in the shares of the capital stock of the Union Stock yards and Transit Company, and to do any and all acts and things tending to increase the value of the shares of the capital stock of said company.

Now, we have two companies, and we have powerful economic and legal reasons that made two companies necessary. Presently we have a third company; that is the Railway Company.

The Railway Company was split off the Transit Company in 1897. The reason for it is apparent. The Interstate Commerce Commission had by this time come into the field. It regulated railways. And that portion of the Transit Company's business that was devoted to the operation of a railway had come under regulation. It was therefore necessary to set the Railway up separately, so that you had a unit that could be and in fact, of course, was thereafter regulated.

The next thing that happened was the splitting off of the Harness and Saddlery Company, in 1900. That is a trivial event, of course. The Harness and Saddlery Company sold a set of harness to a farmer after he brought his hogs into the stockyards, or sold a saddle to a man who rode his horse about the stockyards. But obviously that funny little retail business didn't make much sense in a large company like the Transit Company, and it seemed sensible to set it up as an individual concern, which was done. It was of little importance and does not now amount to much in this picture.

Then comes what we call the Railroad Company. That is 1902. That is the time when if was found necessary to elevate the tracks of the Steam Railway Company that brought the hogs and the cattle in and took the meat out. And in connection with that elevation of the railway tracks, the steam tracks, it was decided it was an appropriate time in which to build a passenger structure, an elevated structure which would bring workers into the yards and out again,—and that was done.

Obviously that Railroad Company, part of the traction system of a city like Chicago, had to be separately incorporated, because it came under the jurisdiction of the City of Chicago; and the Railroad Company was set up.

Then you reach the District, the Central Manufacturing District. To the north of the stockyards there was almost a square mile of land in 1903 that was vacant. It was land to which the packers occasionally pointed, as they occasionally pointed to Indiana, and said, "We could move up there." It was land on which a competing stockyards might conceivably erect yards, and compete with the Transit Company. Not only that, it was land beautifully susceptible to development. And the Jersey Company and those who ran it conceived the idea that that land should be acquired.

partly for protection but chiefly so that it could be developed and become a feeder of tonnage to the railway and thus greatly strengthen the railway.

It was doubtful at that time if a Jersey corporation, a foreign corporation, could own real estate in Chicago. Probably it was more than doubtful. Probably it was impossible. And so the title to the District was taken in the name of trustees under the Massachusetts type of trust, and the Jersey Company held the beneficial shares of interest.

Then the Produce Terminal was split off in 1916. Again there is a cogent reason for that. The Transit Company by that time had begun to furnish power and light in such quantities that it was, as we all know, a tidy little public utility in Chicago, and the Illinois Commerce Commission looked about and said, "Yes, this is big enough now so that it must be regulated; its rates must be fixed," and things of that sort. And so, since that sort of regulation was impending on that segment of the Transit Company's business, the Produce Terminal was split off and set up separately.

Lastly, before we reach the Maine Company, the Pau Corporation was formed. The Pau Corporation must have seemed a little puzzling to some of the Members of the Board and it was to me until I found out the secret of it.

The Central Manufacturing District also owns not only the land I spoke of but the streets in that whole section north of the stockyards, and there are all kinds of curious easements over those streets—a right to run electric light lines from the Produce Terminal, sewers are in there, put in by the District, and then the streets are paved and there are rights of passage and repassage over them, although they are all actually privately owned—and it was found that as the District made conveyances of land, sometimes somebody would remember to say something about the easements.

and sometimes they wouldn't, and some man who had purchased land thought he had certain easements, and there was a dispute as to whether they had been conveyed or not. And it was decided that the simple thing to do with easements was to put them into this curious corporation called the Pau Corporation and let that company deal with them and pass them out in the event they were passed out to purchasers, so that nothing would get done about an easement that wasn't done thoughtfully and meant to be done. This is really the explanation of the formation of the Pau Corporation. It was to clarify this easement situation, what Transit and District owned and what had gone out to somebody else, and to deal with it intelligently as the conveyances were made from time to time.

I have now mentioned all the companies that appear in this situation, except the Maine Company. The Maine Company, as we all know, was formed in 1911, and I would like to take a moment to tell why that company was formed.

This contract with the packers by which they solemnly agreed to stay in the vicinity of the stockyards, had expired by 1911, or prior thereto. On its expiration, the packers once more began to rattle the sabre and said, "Well, Boys, we are going away again unless we get some more of the gravy of the stockyards," and they frightened the directors of the Jersey Company. They said to the directors of the Jersey Company, in substance:

> "Your common stockholders have been getting 8 per cent for quite a number of years. Because they have gotten used to it and like it, they can still have it. But we are going to take any earnings of the Jersey Company above 8 per cent from now on, or else we are going away."

By this time, Mr. Prince had come to own a little Jersey stock. He had been very much interested in this situation,

and he did not share the fright of his fellow directors on the Jersey Board. And Mr. Prince decided there was a way in which the packers could be kept at Chicago and this sabre rattling stopped, and that way was this. He decided if he formed this Maine Company, and if he gave Mr. Armour, the leading packer, a 20 per cent interest in it, that this talk, which I think Mr. Prince thought, as I have always thought, was slightly bluff, he thought this talk would cease.

So Mr. Prince went to the common stockholders of the Jersey Company and said:

> "Now, these threatening, sabre rattling packers are offering you 8 per cent, and they say you have got to take it or your company is going to disappear. I will tell you what I will do. I will form a corporation and I will put a million cold dollars into it, and I will guarantee you 9 percent, if you will promise me that anything that the Jersey Company earns over 9 percent can go to the Maine Company, and I will take the risks of this sabre rattling and these threats, and I will bet my million dollars on it that the packers don't move away. If they do, I have lost my million dollars, and your stockholders get the guarantee. If they don't, my part of the wager is that if Jersey makes more than 9 per cent from now on, the Maine Company gets that."

Mr. Prince also said one other thing to the Jersey Company stockholders. He said:

> "If you would rather trade your stock in for bonds of this Maine Company in which I am putting this cold million, you may do so, and you may take down two dollars in bonds for each dollar of Jersey stock, and the bonds will be 5 percent bonds and you will get ten

dollars a share on your old Jersey stock, if you will trade your stock for bonds."

The plan appealed to the Jersey stockholders. Large numbers of them traded their stock for bonds of the Maine Company, and such of those who did not make such trade sent in their stock and had it stamped with this guarantee of the Maine Company, by which they received the Maine Company's guarantee that they would in perpetuity receive 9 per cent dividends, and in the same instrument they assigned to the Maine Company all earnings in excess of 9 per cent.

I think Mr. Green is a little allergic to what I say. He says I shouldn't say "in perpetuity." He says I should say "for the corporate life of the Jersey Company," and that, of course, is more accurate, because, as we all know, the Jersey Company charter did expire in 1940.

Now, what is the situation? After the Maine Company is formed, what is the situation? The situation is this:

The Maine Company has had one million dollars put into it, which in 1911, was a huge sum of money. And it was put in, as I say colloquially, on this wager, the wager that the packers would stay and that the Jersey and its subsidiaries would make money and that the Maine Company would get more than 9 percent out of it in the future. If the wager lost, if the packers still moved, in spite of Mr. Armour's having come into the Maine Company, or, quite aside from that, if some other disaster overtook the operating companies in Chicago, so that they had no earnings for a year or two or three years, the situation was such that if the Maine Company were called on for its full guarantee, the million dollars of the Maine Company's capital would have been exhausted in just about two years.

Now, that being true, it was of course intended that the

Maine Company should move in on the Jersey Company, run its affairs, and run the affairs of the subsidiaries.

No company in its senses could, of course, make that wager of a million dollars, which might be wiped out in two years, unless it had full and complete say-so as to what went on in the Jersey Company and the subsidiaries. And so when the Maine Company is formed, you will find Mr. Prince moving in on the Jersey Company, becoming its president, putting in his Board of Directors, and of course you find the Maine Company becoming a large owner of stock in the Jersey Company and directing its destinies thereafter.

When this is done, you have what I think must have seemed to Your Honors a somewhat complicated corporate situation. I have traced with your Honors the history of how you began with one company and ended with all these companies. But I hope I have demonstrated to you that all the way along there was a cogent economic and generally a cogent legal reason, as well, for each change that was made. Nothing was done at anybody's whim. It just had to go this way. But when you get to the end of it, although you have several corporations, you have still just one enterprise. It is still a unit. The Transit Company is what we often call a hotel for hogs. The Railway Company brings the guests in and takes them out dead. That is the Railway, not the Railroad. The Railroad Company brings workers in to work and takes them away.

The Produce Terminal makes light to light up the yard and the packers. The Central Manufacturing District sits off to the north, creating immense tonnages of manufactured goods and raw materials that move in and out on the Railroad. It is all integrated, all a unit; each depends on the other, and the fact that you have several corporations is just an accident that was forced on the enterprise by the history which I have pointed out to you.

What about the Jersey Company, after the Maine Company is formed? It has been superseded. The Maine Company is now the genius, the head, the directing company in the thing. The Jersey Company has become a shell. It is a conduit only for money that flows to the Maine Company, and it doesn't even remain a conduit.

On October 1, 1914—and this is Exhibit S-46—something dramatic happens, as between the Maine Company and the Jersey Company. That is an agreement that is entered into on that date, which we have called the by-pass agreement, and it is an agreement under which the Jersey Company agrees that hereafter all earnings from the operating companies shall by-pass the Jersey Company, shall not even go into its treasury and out again into the Maine Company, but shall flow direct from the operating companies to the Maine Company.

I am going to deal more fully with that agreement at a later point in my argument. I have pointed it out now only for this purpose, to show that by the time 1914 had come around, the Jersey Company, as a going business concern, was completely emasculated and completely dominated by the Maine Company.

This Maine Company that I have now described to you is a company which the majority has said is a holding company and a mere holding company. I wish now to call Your Honors' attention to some definitions of a mere holding company that are in print. The first definition of a mere holding company—and I am not reading to you but I am quoting from memory—as early in the case I looked it up in the dictionary, and the meaning of the word "mere" was given as this: "Nothing else but". The dictionary says that the word "mere" means "nothing else but", from which it follows that a mere holding company must be a company that does nothing else but hold securities.

Well, I am not sure the dictionary is a perfect authority. But some other people besides Webster have defined what a mere holding company is.

I would like at this point to call Your Honors' attention to *Chevrolet Motor Company v. U. S.*, 64 Court of Claims, 211; certiorari denied, 277 U. S. 585. That was a case where the Chevrolet Motor Company sold to General Motors its whole works. It sold its plant, its receivables, every asset that it had, and stood there thereafter as what seemed to be pretty much a shell. But it did do one or two things. It subscribed to some stock of General Motors Company and had something to do with contracts about some financing, and that is all. And when the Commissioner of Internal Revenue said to the Chevrolet Motor Company, "Won't you be good enough to pay a capital stock tax for doing business?" the Chevrolet Motor Company said, "No, thank you. We don't want to pay; we are not doing business, and we are a mere holding company."

But the Court of Claims said otherwise, and I would like to quote one or two sentences from their opinion. Speaking of this company which I have described, they said this: (p. 222)

> "While it discontinued to manufacture motor vehicles, it did not reduce its activities to a mere holding company. It continued a series of business transactions designed and intended to facilitate the successful conduct of the corporation in which it owned a controlling stock interest, and loaned not only its valuable assets to enable the latter to finance vast and important business undertakings but served itself as a conduit or subsidiary for the accomplishment of the purpose, and it is seemingly idle to contend that all this, involving millions of dollars, was done without hope or expectation of profit."

And then dropping down a ways in the opinion: (p. 222)

> "While plaintiff's officers drew no salary and it maintained no expensive organization and had reduced its overhead to the minimum, a fact accounted for in the transfer of the entire organization of the plaintiff to the General Motors Corporation on the date of sale, nevertheless it continued to function in a way that clearly demonstrates that what was done wasn't a mere passive, inert activity looking toward the liquidation of its assets or the usual activities of a holding company, but a lively participation in the activities of two other corporations linked with it, and whose success and profits redounded beneficially to the plaintiff. The plaintiff loaned its corporate powers to other corporations, engaged in and became an important instrumentality in their activities, and participated in their business transactions. Surely this is carrying on business. If not, it is difficult to characterize it."

The next case to which I wish to call Your Honors' attention is *Edwards* (*Collector of Internal Revenue*) *v. Chile Copper Company*, 270 U. S. 452. The situation was a similar one, a company seeking to avoid paying a capital stock tax on the ground it wasn't doing business, and I wish to quote very shortly, from the opinion in that case. Incidentally, the opinion is by Mr. Justice Holmes. (p. 455)

> "The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit. * * * The activities and situation must be judged as a whole. Looking at them as a whole we see that the plaintiff was a good deal more than a mere conduit for the Chile Exploration Company. It was its brains or at least

the efferent nerve without which that company could not move."

Without reading from them I would like to call Your Honors' attention to two other cases that are similar. One is the *American Investment Securities Company v. U. S.*, 112 Federal (2nd) 231, which was decided in June of this year, on June 7, 1940.

The other one is *Industrial Bankers Securities Corporation v. Higgins*, 104 Federal (2nd) 181.

I was, I think, tempted to read from that case in part because it was tried by Mr. Green and by me. Certainly I can say this much, that I am as familiar with that case as I am with this one, and it is a curious situation, if the petitioner in that case is found to be something other than a mere holding company, and the petitioner in this case is found to be a mere holding company.

Having, as I hope, defined from the dictionary and from these cases what a mere holding company is, I think Your Honors will bear with me for a moment while I turn to the record and read a few short excerpts from it as to what the Maine Company did. I turn first to the testimony of Mr. Leonard, who is the president of the Transit Company, and I read shortly from his testimony. (R. 100)

Speaking of the time when a man named Mr. Spoor died, I asked him this question:

"*Q.* What change was there?

"*A.* Well, the change was that the Maine Company had come in—the officers of the Maine Company came west quite frequently.

"*Q.* Did somebody go out to the board out there?

"*A.* Sir?

"*Q.* Did somebody go on the board of directors?

"A. A Mr. Prince, who was president of the Maine Company, went on as chairman of the board of the Transit Company.

"Q. Did representatives of the Maine Company now begin to come west?

"A. Oh, they came west with increasing frequency and gave orders and directions what to do. We might send suggestions to the east, and they might come back in the form of an order.

"Q. And they might not?

"A. And they might not.

"Q. Now, take by 1930 to 1933, what was the relationship by that time?

"A. Well, the Maine Company was practically in the saddle, and I was about the hired man, I guess, you might say, and the orders came from the east and told us what to do and how to do it.

"Q. Was there any daily contact between—

"A. Oh, yes, there was.

"Q. Was there any daily contact between you men that were running the Transit Company and Produce Terminal and the District with the officers of the Maine Company?

"A. There was.

"Q. How was that contact?

"A. Telephonic.

"Q. And how often?

"A. Oh, frequently, many times a day.

"Q. Now, could you give me, Mr. Leonard, some examples of things that would be decided or handled by the Maine Company in the years '30 to '33?

"A. Well, during those years we had the banking crisis in Chicago, and the Transit Company and the various affiliate organizations were badly affected, and the Maine Company, or the easterners, handled the entire situation.

"Q. During this period, 1930 to '33, what would be the situation in case of changes in personnel out there in Chicago?

"A. Well, we would, if there was any of the principal officers, we would submit the names of successors to the east and for their approval.

"Q. And were the ultimate appointees chosen by you in the west or by the Maine Company?

"A. They were chosen by the Maine Company.

"Q. How about dividend policies?

"A. Oh, they were—they were decided by the Maine Company, what to do and what dividends to pay."

I am going ahead with this, but may I interpolate at this point, the majority said in its opinion that what was done in Chicago was done by Prince, and that I am going to deal with in a moment. But as you listen to me read this, will you just see how the witnesses put it. They don't say "Mr. Prince." See how that "Maine Company" comes up again and again in the testimony of these witnesses as they tell how they got their orders.

Member Opper: Mr. Welch, may I interrupt you a moment there?

Mr. Welch: Certainly.

Member Opper: I take it you will agree this witness was an interested witness?

Mr. Welch: Oh, indeed.

Member Opper: And therefore that the way to get at

the facts is to take the most unfavorable factors of his testimony more strongly, perhaps, than the favorable ones, that is to say, that if he makes an admission by what he says, that that is in effect an admission against interest, which is important in the case of an interested witness and perhaps wouldn't be in the case of a disinterested witness.

Well, I am not going to ask you to comment on that, but with that as a preliminary, I want to ask you what he means when he says "The Maine Company" or "the easterners." What does he mean by that?

Mr. Welch: I don't see what he could mean, except possibly the Jersey Company or the Maine Company.

Member Opper: "Easterners", in the plural, what does he mean by that?

Mr. Welch: Maybe he means Mr. McDonough, or other eastern individuals. I am perfectly willing to face the fact that he may have meant that.

Member Opper: Thank you.

Mr. Welch: Have I answered Your Honors' question?

Member Opper: I think so, yes.

Mr. Welch: I shall deal in a moment in my argument with what the situation is when human beings named Prince and McDonough go to Chicago and give orders.

(R. 102)

"*Q.* Did the Maine Company in those years have anything to say about where your funds were kept?

"*A.* Yes.

"*Q.* What did they have to say?

"*A.* They indicated the banks in which the funds should be deposited.

"*Q.* Now, you have authority, I take it, to sign checks, Transit Company checks, do you not?

"A. Oh, yes.

"Q. Is it within your power to draw a check for any sum that is in the bank, if you wish to?

"A. Yes.

"Q. Will you tell His Honor as a practical matter how you exercised that power?

"A. Well, anything that for large sums that the Maine Company are familiar with as we go along in daily routine, why, we don't consult them for the payment of those—the issuance of those checks, but any unusual large amount for—we would consult the Maine Company and obtain the authority."

Let me move for a moment to Mr. Henkle, a witness from Chicago.

Member Kern: At what page of the record?

Mr. Welch: I am now on page 164. I wonder if I gave the stenographer the page on the last one. If not, I will supply it for the record.

"Q. Mr. Henkle, I would now like to ask you what, if anything, the Maine Company, the taxpayer in this case, has had to do with this exposition?

"A. Well, we wouldn't have been able to hold it since 1934 if the Maine Company had not given us permission and authority to reproduce the buildings that burned."

Moving over to 168, speaking of the Produce Terminal now, Mr. Henkle was asked this question:

"Q. Was there any place to which you could turn for financing as you needed to expand?

"A. Well, we turned to the Maine Company.

"Q. Have you had occasion to do that in the past?

"A. Yes, sir.

"*Q.* Now, what part, if any, does the Maine Company play in the management of Produce Terminal, taking the years '30 to '33?

"*A.* Well, the Maine Company was constantly in touch with the affairs of the Produce Terminal and if we wanted any additions to the power house or the distribution lines, they were discussed with the Maine Company, and if they were authorized by them, then we could go ahead and enlarge our facilities.

"*Q.* Does the Produce Terminal make any reports of any kind to the Maine Company?

"*A.* Yes, sir.

"*Q.* What kind of reports and how often?

"*A.* They make a complete operating report every month."

I showed him this book and it was offered and put in evidence. He says, on page 169:

"This is a summary of operations for the month of December, 1933, containing 16 pages all relating to details of operation of the plant. That goes to the Maine Company every month."

And on page 170:

"*Q.* Who decides who shall make up the board of directors of the Produce Terminal?

"*A.* The Maine Company.

"*Q.* Who selects your bank depositories?

"*A.* The Maine Company.

"*Q.* Was there a substantial installation of new machinery in Produce Terminal in 1932 and 1933?

"*A.* Yes, sir.

"Q. Was that matter discussed with officers of the Maine Company?

"A. Yes, sir.

"Q. To what extent, Mr. Henkle?

"A. Well, Mr. Leonard and I figured out what we thought we needed in the way of additional equipment, and it was discussed with the Maine Company and they approved of our going ahead with the improvements.

"Q. Have there been any occasions, Mr. Henkle, when suggestions of yours as to something you wished to do about Produce Terminal have been turned down?

"A. Yes, sir.

"Q. Go back for a moment to that installation of machinery. From whence did the money come?

"A. It came from the Pau Corporation and the Pau Corporation received it from the Maine Corporation.

"Q. Can you give us a sample, Mr. Henkle, of a suggestion of yours on behalf of Produce Terminal made to the Maine Company which was turned down?

"A. Mr. Leonard and I felt we should have a larger addition to the power house than that we finally succeeded in getting, and we wanted a greater capacity and a larger power house than we succeeded in getting them to build.

"Q. When was that, Mr. Henkle?

"A. That particular instance was in 1936 and 1937.

"Q. I would like to ask you, Mr. Henkle, if the Transit Company makes reports to the Maine Company of its operations?

"A. It does."

And then I show him a book, and that is put in evidence.

"*Q.* How often is such a report made?

"*A.* Every month. It contains 32 pages."

I now go to Mr. Austin, Secretary and Treasurer of the Railroad, on page 220.

"*Q.* Mr. Austin, if some disaster such as a fire, or anything of that sort were to overtake the elevated structure—"

speaking now of the Railroad—

"—and it had to be rebuilt, what, if anything, could the Railroad Company do about it?

"*A.* Well, there is nothing to do but take the matter up with the Maine Company, have the Maine Company rebuild it and furnish the bonds."

The record reads "furnish the bonds" which I think probably was in error, for "furnish the funds". But I have read the record as it appears.

This same witness, on page 222, speaks of the Railway Company and the disbursement of dividends.

"*Q.* And under whose instructions are they disbursed as dividends?

"*A.* They are disbursed as dividends under the instructions of the Maine Company.

"*Q.* You spoke of depositing funds. Who selects the banks in which you make your deposits?

"*A.* That is selected by the Maine Company also."

I then go to Mr. Hackett, on page 247, testifying about the Central Manufacturing District and discussing plans being drawn:

"*Q.* After the plans are drawn and the contract is prepared and signed, or prior to signature, what would happen then?

"*A.* When I know that the concern really means busi-

ness, I communicate either by telephone or by letter with Mr. Prince, if he is available; if not, I confer with Mr. McDonough.

"*Q.* And in what regard do you communicate or confer?

"*A.* About the name of—I give the name of the company; I give his financial standing; I give the type of structure he requires and the location, in which district it may be. In fact, I give him a resume of the highlights of the whole thing, including the financial responsibility of the concern.

"*Q.* Then what happens?

"*A.* I either get permission to go ahead or if they don't like my prospect, or the type of building, they will turn me down. If I am permitted to go ahead, the money for the building is furnished by the Maine Company if we have insufficient funds in the District.

"*Q.* Now is this type of thing, Mr. Hackett, the only interest the Maine Company was showing in your operation in the years '32, '33?

"*A.* Oh, no, there was nothing of any importance that transpired in the District that I did not confer with the Maine Company about, whether it was a lease, a purchase, contract, failure of a lessor, a failure of a purchaser to go through with his contract, taxes, tonnages; in fact, everything of any importance I felt obligated to go to the Maine Company for instructions.

"*Q.* Do you have any system of reports to the Maine Company?

"*A.* We have a monthly report, which is sent to the Maine Company."

And then I deal with that some more.

Now, I go to Mr. McDonough, who testifies from the other end, he being the Assistant to the President of the Maine Company during the years in question; and I take him up first at page 313.

"*Q.* Will you tell us what your duties were then?" That is the period 1930-1933.

"*A.* Under Mr. Prince's direction while he was in this country, and while he was away, personally, I was continually on the telephone while I was in the East conferring with the operating men in Chicago, and directing the business policies of the company, the selection of officers and directors, bank deposits, general matters of policy, other than the actual routine operating of these companies.

"*Q.* Would it be fair to say that you were the chief executive officer of the Maine Company in Mr. Prince's absence?

"*A.* Yes, sir.

"*Q.* And when Mr. Prince was available?

"*A.* I consulted him first, and after the result of the conferences, our orders were passed on to Chicago and were carried out at once.

"*Q.* How was your time divided between the West and the East?

"*A.* I made two—I made at least two trips a month to Chicago, and if the occasion warranted it, I made more; and during the bank crisis, I was out there for several months.

"*Q.* Mr. Green points out to me that you said something about directing the policies of 'those companies'.

By 'those companies' did you mean the operating companies?

"A. I meant the operating companies.

"Q. In Chicago?

"A. In Chicago; yes, sir.

"Q. Taking the years 1930 to 1933, did you receive any reports of the operations of the units in Chicago?

"A. I did.

"Q. And by 'units' I mean, of course, the Chicago companies.

"A. The Transit Company; the Railway Company, the Produce Terminal Corporation, and the Central Manufacturing District.

"Q. When you received those reports, what did you do with them?

"A. I examined them and discussed them with Mr. Prince.

"Q. And as a result of that examination, or that discussion, would anything happen from time to time?

"A. Yes. The suggestions and orders would be given to the operating men in Chicago telling them what the Maine Company wanted them to do.

"Q. Now, will you tell us in a general way what sort of orders would go out from you to the Chicago companies?

"A. Well, if there were any changes in officers or directors, the manner in which bank deposits were handled, and what bank the moneys were to be placed, if there were any large sums requested for additions or improvements, or if the District wanted money to buy real estate or put through a big real estate deal, any matter that called for large amounts of

money that was out of the ordinary daily business, we would discuss and pass on them.

"Q. And after you had passed on them?

"A. Those orders from the Maine Company would be carried out at once, on the spot.

"Q. I think you have already mentioned the banking crisis in Chicago, as I call it.

"A. Yes.

"Q. You have already mentioned some transactions relating to the Chicago banks?

"A. Yes, sir.

"Q. I think you said you were out there at that time?

"A. Yes, sir.

"Q. What, if anything, did the Maine Company do about the way that whole matter was handled?

"A. The Maine Company handled and controlled the entire transaction from beginning to end. It controlled it by passing orders down to Mr. Reimers and to Mr. Leonard and Mr. Hackett. As far as Mr. Hackett was concerned, they were carried out forthwith.

"The Member: You are talking about the situation in the early part of 1933?

"The Witness: Yes, sir; at the time the bank was reorganized; yes, sir.

"By Mr. Welch:

"Q. Who decided what accounts were to be subordinated?

"A. The Maine Company, through Mr. Prince and myself; principally through me because I was on the spot.

"Q. And the amounts and the ranking of the subordination?

"A. Yes, sir; the amounts and the ranking and how they were placed; yes, sir.

"Q. When did you first become assistant to Mr. Prince, the president of the Maine Company?

"A. About 1926."

Skipping to page 321, and talking of a conversation with Mr. Prince:

"Q. Did he say anything else at that time, Mr. McDonough—refreshing your recollections; did he say anything about you going to Chicago?

"A. Yes, he told me that he wanted me to be familiar with the operations, because of the extra duties that were falling upon him in the Maine Company, because of taking over the active control of the properties in Chicago. He wanted me to go out there to the live stock show, become familiar with its purpose, to take and familiarize myself with all of the properties and with their workings, and to come to know who the people were who were in them, and to meet the people who were out there, to do business with them."

And, on page 322:

"Q. What would you say was the extent of your activities in managing the operating companies in the years in question here, 1930 to 1933?

"A. Well, in constant touch with them.

"Q. Were you doing anything else?

"A. Yes.

"Q. How much else? I mean by that, what proportion of your time and energies by 1930 to 1933 was given to the Maine Company and its interests.

"1. Practically all of it."

And on page 327, speaking of another conversation with Mr. Prince, he said:

"1. Mr. Prince again referred to the obligations of 1940. He told me that the opening of the bank would necessitate the subordinating of at least $4,000,000, and he very definitely made it clear that the Maine Company's subordination was to be treated entirely different from the others.

"He was most explicit in his instructions that I should see to it that the Maine Company's deposit would come—"

And then there is an interruption.

"As near as I can, he was most positive about how he wanted the Maine Company's deposit to be handled."

Now, those are excerpts from the testimony from men in Chicago who told what orders they got and how they carried them out, and from Mr. McDonough who spoke about how the orders were given and how they were obeyed. If it is suggested by one of Your Honors that a question of veracity was raised as to whether or not these witnesses should be believed when they said the Maine Company gave the orders, in all humility I say that that question was decided by the man who heard the witnesses, who saw their demeanor on the stand, and who is well qualified to judge, far better than anyone who has not seen them.

Member Smith: Mr. Welch, where is there anything in the record relative to any actions taken by the Board of Directors of the Maine Company in regard to these important transactions?

Mr. Welch: No; there is no such thing in the record.

Member Smith: How can these men in Chicago know it was the Maine Company directing them when they simply received their orders from Prince or his subordinates, and Prince being the president of the Jersey Company and the Chairman of the Board of Directors of the Railway Company and the Transit Company?

Mr. Welch: That question I am glad Your Honor asked because it merely leads me to the next point I wish to argue.

There came the time when these operating men in Chicago saw a man by the name of Prince and a man named McDonough, and those two men came out there and started giving orders.

The operating companies, those men out there, they knew who their stockholder was; it was the Jersey Company. They knew when Mr. Prince appeared in Chicago that he owned not a share of Transit, not a share of Railway, and yet here was a man coming out and saying he wished to go on that Board of Directors.

Does Your Honor imagine that had I gone out there and said, "My name is Welch and I would like to be on your Board of Directors," does Your Honor think I would have gotten on the Board? And when Mr. Prince says, "I would like to go on your Board of Directors," how come he gets taken on? He gets taken on purely because those men in Chicago now know he is the President of the Maine Company and that the Maine Company is what Mr. Justice Holmes calls the efferent nerve that is now directing this enterprise.

He had no other standing to get on those Boards and when he gets on those Boards, the majority wishes to suggest that he acted, not as the President of the Maine Company, but as an individual.

But he has no weight as an individual. He is not a stockholder. He has nothing to do with those companies except in so far as he is given power and authority by the fact that he is the President of the Maine Company, the genius, the brains, the efferent nerve that makes this thing happen. He cannot be just an individual. No individual can stroll into Chicago and have the power that he had, and his power can come from only one place, and that is the Maine Company, because that is the only company in which he is a stockholder and has a real voice.

And in connection with that; I think I would like to point out just one thing that happened. Take that bank crisis and the ten million dollars, half of which went down the sewer. Now, there was something of the most critical and grave importance. And can anybody read this record and fail to see that the Maine Company was the efferent nerve in that transaction? Was it just an accident that the Maine Company in the subordination agreement was put on the top level and that the other companies were put in their places?

And let me say a word about Mr. McDonough going to Chicago. He owns no Transit stock; he owns no Railroad stock; he isn't a Director of any of the companies. What gives him authority to speak in Chicago? Simply that he is the Assistant to the President of the Maine Company. He has no other position.

In view of the cases I have read to Your Honors, and in view of this record and the testimony of these witnesses and what happened, and particularly in relation to the bank crisis, how can it be said that the Maine Company was one of these inert companies who did nothing, and simply

sat there inertly and stupidly and held and did nothing else?

Mr. Clark: I am awfully sorry to interrupt but I understand I have a telephone call.

May I be excused for a moment?

Member Smith: Yes, and if there is no objection, I think we might recess at this time.

Mr. Welch: Yes, that is quite all right.

Mr. Clark: I would like to say—and this can be off the record—

(Discussion off the record.)

Member Smith: Then suppose we convene at 1:45. We will recess now until 1:45.

(Whereupon, at 12:20 p.m., a recess was taken until 1:45 p.m. the same day.)

AFTERNOON SESSION.

The Division resumed hearing at 1:45 o'clock p.m.; whereupon, the following proceedings in oral argument were had:

Mr. Welch: Before I leave this question as to whether or not the Maine Company was a mere holding company, I would like to say just one other thing about it.

Suppose it were faced with a capital stock tax, and suppose I sought a decision that I need not pay it, and it came before Your Honors, and I attempted to show that the Maine Company, in the words of the Chevrolet case, was a mere holding company, one of these inert companies; and let us suppose, if you please, I was so happy as to have His Honor, Member Opper, hear the case because I think he would give me the most hope when I came in on that; and suppose Mr. Clark tried it against me, and he came in and produced this record and showed what the Maine Company did, how far it was from one of these inert companies.

In all fairness would not this Division, if I tried it before this Division, say to me, "Oh, Mr. Welch, go away and draw your check and pay the tax."

I don't consider this point the most important point in the case. I feel deeply about it only because of this: It seems to me I have all the ammunition, all the law, everything my way on it and I shall not be proud of my powers of argument if I fail to convince this Division, or the Board as a whole, that this Maine Company was something other than a mere holding company and an inert, lifeless thing that did nothing.

I now pass on—

Member Opper: Mr. Welch, may I interrupt you to ask whether you were not, just before the recess, discussing

an answer that you were making to Mr. Smith's question to you, which, I think, was the result of some suggestion of yours, that this was a question of the veracity of these witnesses when they testified that it was the Maine Company that instructed them to do this, that instructed them to do that, and telephoned them several times a day, and so forth. Am I right about that?

Mr. Welch: If I understand Your Honor, you are, sir.

Member Opper: And I was just wondering, as I recall it, what you said, if you said that it was only because Prince came out there and was known to be the President of the Maine Company, and that he was elected to the Board and made Chairman of the Board, and so forth, of these operating companies.

What I wanted to ask you, was that the full scope of the answer that you proposed to make to Mr. Smith's question? I don't mean to be obscure about this, but what I had in mind was that I was hoping that you would go on from that and give us some light on this proposition.

Assuming that that was the reason—and I am not going to go into the question of whether or not it was——but assuming that that was the reason Prince was elected to these jobs, then when they had these conferences on the telephone, was it possible there was any way they could tell in what capacity it was that Mr. Prince was talking to them?

Mr. Welch: Now may I answer?

Member Opper: Well, yes; I want to go on with this.

Mr. Welch: Indeed, there is a way they can tell how Mr. Prince is talking to them, because if Mr. Hackett, for example, calls on the telephone and says, "I would like to build a building in the District and I need a half million dollars that I haven't got," and after the telephone con-

versation is closed, a check of the Maine Company comes through for the half million dollars, I should say that when Mr. Hackett glances at the check, there is no confusion in his mind concerning with whom he was talking. He gets the check of the Maine Company.

I should say when the men there in the West were having their fearful trouble with the bank situation and when they talked with the East, and if they wondered, as Your Honor suggested, with whom they were talking, when they got the orders of the Maine Company and the drafts of the documents drawn by the lawyers of the Maine Company to put its claims against the banks on the higher level, and when they got the word to do the trick, to do it this way, I should say these men had no doubt about who was speaking, and no doubt about what company gave to Mr. Prince the authority with which he spoke.

Member Opper: I don't mean to be frivolous, but I take it you wouldn't say, when they called on the telephone, or when somebody called them on the telephone that the voice would say, "This is the Maine Company speaking."

Mr. Welch: Indeed not. Human relations aren't that way.

Member Opper: And that the voice would be "This is Mr. Prince speaking," or, when they called up, "I want to talk to Mr. Prince."

Mr. Welch: That is correct, of course.

Member Opper: And therefore when they said on the stand that it was the Maine Company that gave them directions on the telephone, they were giving a conclusion which they drew from a number of different things. Is that right?

Mr. Welch: I think that is correct.

Member Opper: So that, in effect, when they testified,

it was not under what a very searching cross examination might have brought out under actual circumstances such that we would think of it as a fact; but they were testifying to a number of facts which, in the back of their minds, all summed up to the answer they made, in other words, the conclusion of the witness which was obviously, I think we all agree now, obviously not a statement of the fact as it actually occurred. That is, they did not get a statement "This is the Maine Company talking; you are to do so and so." Is that right?

Mr. Welch: Oh, yes. Your Honors would just wish to hit me with something if I claimed the people in Chicago would take down the telephone and say, "Hello," and hear "This is the Maine Company;" but, no, they would say, "This is Mr. McDonough," or "This is Mr. Prince."

But don't forget that corporations can't speak except through human voices. We have to have somebody like Mr. McDonough or Mr. Prince speaking through a telephone. When these men in Chicago draw a conclusion as to the entity with which they are dealing, you must bear in mind they draw it in the light of their experience and what happens to them. And, in particular, with reference to Mr. Hackett, as I pointed out, if after one of these telephone conversations he receives a check from the Maine Company that lets him build a building, is it any wonder that when he testifies in a court room about who it was with whom he was talking, that he says it was the Maine Company, since it was the check of the Maine Company he gets as a consequence of the conversation?

Member Opper: That is exactly the point I wanted to get at, Mr. Welch. I wanted to see if we couldn't clarify all of our discussion so that what we would come down to would be what we have just said, so that when Mr. Hackett said it was the Maine Company from which he got these direc-

tions, he was giving that testimony in good faith; and that was the conclusion he came to as a result of all the circumstances.

But you wouldn't impugn, for that reason, his veracity, and accuse him of testifying to something he didn't believe, though, perhaps you would ask yourself a question whether he was testifying to a fact or to a conclusion.

Mr. Welch: Well, I am not entirely satisfied with that. When Your Honor reads this record, I think you will perhaps be impressed with how these witnesses take the stand and say, one after the other, "It was the Maine Company that ordered us around," and "It was the Maine Company to whom we reported." "It was the Maine Company on the telephone."

Let us just bear in mind that those witnesses were here, after having lived some years in that situation, and I only say to Your Honor it is impressive to me that they felt the lash and the whip and the direction of the Maine Company. That must be the sum total of their experience, and they stated it on the witness stand. And it was to me, and I think will be to Your Honors, a very moving thing.

At this point Your Honor suggested something about throwing some light on something, and I am going to say very softly something Mr. Green wished me not to say. But it is said in the opinion that the Maine Company was the corporate clothes of Mr. Prince, that he put on corporate clothes, and wore them thereafter. I think in view of that it would be gracious to me to say that when Mr. Prince reached Chicago, he still wore his suit of corporate clothes.

I can't see how, in fairness, it can be said that when Mr. Prince gets out to Chicago, he forgets his suit, and he is just an individual. It seems to me it would have been a

little fairer to have him wear his corporate clothes in Chicago as well as in Maine.

Member Smith: May I interrupt to suggest that the language of the statute is "a mere holding or investment company". You have addressed your remarks to prove this is not a mere holding company. Have you anything to say to the question of whether a "mere investment company" might be something different from "mere holding company"?

Mr. Welch: I can't see any distinction there; it is the word "mere" that counts. "Holding" and "investment" seem to be substantially interchangeable terms. "Mere" is the key to it. It is the "nothing else but". I could strike everything I said on "holding" and say "investment," and it would be the same. It is the word "mere" that counts in this case and not "holding" or "investment".

And I think I have done all I can to indicate to Your Honors that this "mere" thing is just too hard for me to take.

Now, I go on to the next point in my motion.

Member Smith: May I ask you, Mr. Clark, have you any statement to make?

Mr. Clark: I have only one question, Your Honor. Your Honor asked petitioner's counsel this morning if there had been any records of Directors' meetings introduced into the record relative to the Maine Company and its handling of these affairs in the West.

I would like to ask petitioner's counsel if there is in the record anywhere even a letterhead of the Maine Company on which anything was written relative to these instructions or directions.

Mr. Welch: I don't know just how to answer that.

Mr. Clark: Well, do you have any recollection? There either is or isn't, and if you can't recall, and I can't, I don't remember myself—and I wonder if you do.

Mr. Welch: I have this difficulty, that I hesitate because I am in some other litigation involving the Maine Company, where there were quantities of correspondence involved. Can't you say?

Mr. Clark: No I can't.

Mr. Welch: It is an extremely voluminous record and I can't say to Your Honors definitely I have a recollection of seeing that letterhead in this case.

Mr. Clark: That is all I had to suggest.

Mr. Welch: In Paragraph 20 of my motion, I move that the Board strike out finding of fact No. 45, and substitute this finding:

> "During the years 1930, 1932, and 1933, the petitioner did not permit its gains and profits to accumulate beyond the reasonable needs of its business."

In connection with this portion of my argument, I have again prepared some chalks that will help Your Honors in following what I have to say, (distributing copies of two-page statement or tabulation). And may I ask that the stenographer copy the two into the record at this point so that the other members of the Board can follow it when the time comes?

CHICAGO STOCK YARDS ENTERPRISE

Statement as of December 31, 1929 and December 31, 1933, showing obligations which must be met and liquid assets in whole enterprise available to meet them upon two bases:

Basis I that Jersey Co. be liquidated in 1940

Basis II that Jersey Co. life be continued beyond 1940

(Figures from Respondent's Exhibit C)

Basis I

	As of Dec. 31, 1929	As of Dec. 31, 1933
Obligations		
Jersey bonds due 1940	14,000,000.	14,000,000.
District bonds due serially up to 1940	3,909,000.	2,250,000.
Railroad bonds due 1945, maturity accelerated by liquidation	2,327,000.	2,327,000.
Transit bonds due 1930	500,000.	0
Total bonds Jersey and its subsidiaries	20,736,000.	18,577,000.
Jersey Pfd. not owned by Maine Co.	6,453,400.	6,263,800.
Bonds and Pfd. not owned by Maine Co. ahead of Jersey Com.	27,189,400.	24,840,800.
Maine Co. bonds due 1961, maturity accelerated by liquidation	3,227,000.	2,620,000.
Total obligations	30,416,400.	27,460,800.
Liquid Assets of Enterprise		
Maine Co. and Produce Terminal	12,110,800.	14,014,400.
Jersey Co. and subsidiaries	*9,594,300.	3,815,500.
	21,705,100.	17,829,900.

* (Includes impounded funds $2,013,500. released to Transit Co. in 1932)

Brought Forward	21,705,100.	17,829,900.
Less minimum working capital	5,000,000.	5,000,000.
Available assets	16,705,100.	12,829,900.
Excess of obligations over liquid assets available	13,711,300.	14,630,900.
Excess of obligations $919,600. greater in 1933 than in 1929		

BASIS II

If Jersey Co. continued beyond July 10, 1940, the maturities of the Railroad and Maine bonds would not be accelerated in 1940 and it would not be necessary to buy or pay Jersey Preferred at or by 1940. Payment of these items would be postponed.

Obligations outstanding to be met by 1940 were—

	As of Dec. 31, 1929	As of Dec. 31, 1933
Obligations		
Jersey bonds	14,000,000.	14,000,000.
District bonds	3,909,000.	2,250,000.
Transit bonds	500,000.	0
Total obligations to be met by 1940	18,409,000.	16,250,000.
Liquid Assets of Enterprise		
Maine Co. and Produce Terminal	12,110,800.	14,014,400.
Jersey Co. and subsidiaries	*9,594,300.	3,815,500.
	21,705,100.	17,829,900.
Less minimum working capital	5,000,000.	5,000,000.
Available liquid assets	16,705,100.	12,829,900.
Excess of obligations over liquid assets available	1,703,900.	3,420,100.
Excess of obligations $1,716,200. greater in 1933 than in 1929		

* (Includes impounded funds $2,013,500. released to Transit Co. in 1932)

I shall, as my argument proceeds, call Your Honors' attention more closely to this chalk, which is made up from the testimony in this case than I mean to do at this moment. I want to begin by calling Your Honors' attention to the situation of the Maine Company at the end of 1929, as appears from Exhibit S-52 of the record. As of the end of 1929—and I am not now speaking from this chalk; I am saying something outside the chalk—the Maine Company had invested in Jersey common the sum of $10,993,551, and it owned 58,742 shares—shares of the Jersey common. That stock ownership, that eleven million dollar investment plus the contract with the other Jersey shareholders by which their excess earnings over 2 percent went to the Maine Company, is the heart of the Maine Company. That is what makes the Maine Company click. It is its ownership of that stock and its contract with the other stockholders that produces substantially all of its income, as we know.

And I want to fix firmly in the minds of Your Honors that at the end of 1929 the Maine Company has eleven million dollars invested in that stock. Now, at the same moment, what is the situation of the Jersey Company? Such income as the Maine Company permits it to receive comes all from the Railway and the Transit. Its principal assets are Railway and Transit and District.

Now, as I said earlier in my argument, these are a unit and each depends on the other. The cash of the Jersey Company was only $400,000 and its only other asset that had any substantial value was Indiana Harbor Belt Railway bonds, worth $2,500,000.

Now, ahead of the common in this picture, which is what the Maine Company had its whole life invested in, ahead of the common there were charges on the earnings in this enterprise, and what were these charges? First, there were fourteen million dollars of Jersey bonds that mature in

April, 1940, and those bonds are secured by the Railway stock and the Transit stock and these Indiana Harbor Belt Railway bonds.

Ahead is $3,909,000 of District bonds. They are secured by a mortgage on the District real estate. They are also guaranteed by the Jersey Company.

Next there are the Railroad bonds of $2,327,000, which mature in 1945.

Mr. Green wishes me to say, and he is right, that these bonds are secured by nothing of any value except the guarantee of the Jersey Company. The Railroad Company, as Your Honors will remember, is in receivership.

Also ahead of this common is the $6,500,000 of the Jersey preferred, with the 6 per cent dividend requirement.

Also ahead in 1929 are the $500,000 Transit Company bonds due in 1930. And also there must be considered the Maine Company's bonds of $3,227,000, each one thousand of which is secured by five shares of the Jersey common.

Now, as I have said, the Maine Company has this huge investment in this Jersey common in 1929, and as it stood at the threshold of the period that is here in question, the men who ran it had to make up their minds, as business men, what the Maine Company should do about its position.

They had made up their minds years ago, indeed, but let us assume for the fun of it, that they have to make up their minds freshly in 1929. There is one alternative open to them which I discussed in the court room when I was here last, and that is the alternative to let the Jersey common drift; take out all the earnings, not only of Jersey, but of the subsidiaries, and sometimes more, as they have done for years and years; declare dividends from the Maine Company; have a gay time with it; and let 1940 take care of itself.

Now, the other alternative—and I will put the other alternative as simply to do something about Jersey in 1940, and that, again, could be sub-divided either to liquidate it or in some way to extend its life.

I hope I make myself clear. Assuming the Maine Company had to make up its mind afresh in 1929, what it had to do after 1940 came around, as 1940 came along, first it could let Jersey drift; or, secondly, it could plan to do something. And, by planning to do something, it could plan either to liquidate or extend its life.

I don't think there is anyone who thinks Maine should have allowed Jersey to drift, but I would like to take a moment to think it through. As I have pointed out, in 1929 the Jersey Company had $400,000 of cash. Now, if it had been allowed to drift when 1940 came around, fourteen millions of bonds, of Jersey bonds, would have become due, and the Jersey Company would have had exactly $400,000 with which to pay them off.

On the drift policy, what would have happened? There is only one thing that could have happened. The trustee of those bonds would foreclose, and he would sell the assets back of the bond issue, meaning the Transit and the Railway stock, and the Indiana Harbor bonds.

Now, had that happened, if that sort of a forced sale took place, I don't suppose in December of 1929 that you could have looked forward to that kind of forced sale and hope there would be any surplus left after the trustee got his fourteen million dollars. Let us assume, however, that there would be a surplus.

The District bonds would now be in default because we know the Maine Company had to meet the District serial maturities, and we are now on the drift policy, so that that would not have been met. Those bonds were secured by

Chicago real estate—and there is nothing blacker in this period than Chicago real estate, and the real estate mortgage presumably would have been foreclosed and presumably there would have been a deficit there. Had there been a deficit; the trustee of the bond issue would have jumped on the surplus in the Jersey Company if there were a surplus after foreclosing that fourteen million dollar bond issue, and fastened on to his share of that surplus.

What next? The trustee of the Railway bonds wakes up. He observes the Jersey Company is being allowed to drift and its assets are all disappearing and he has its guarantee; he hops on that surplus, if there is one.

What next? The trustee of the Maine Company wakes up and finds his collateral is gone. He jumps on that surplus. His collateral is Jersey common stock, and Jersey is being allowed to drift, and its assets are being taken away from it by the trustee under the mortgage. He jumps on the Maine Company, naturally, to the extent of its funds.

Then what? After all this has happened, the Jersey preferred shareholders come around and take a little look at the carcass, and, if there is anything there, they say, "Well, we have six and one-half millions coming to us." And I suggest to Your Honors that by no wildest stretch of the imagination could anything happen on the drift theory, except that, in the last analysis, if there is anything left at all, the preferred shareholders pick up the hide and the bones of the Jersey Company and go away with it.

And then what has happened? The Maine Company which had an eleven million dollar investment in Jersey common has just committed suicide. It is sunk. It has nothing left to hold that is of any value and it has no hope for the future.

And now, at this point, let me say this, with all the persuasiveness of which I am capable, whatever the Maine Company is, whether it is a mere holding company or not, whether it is a mere investment company or not, and whether or not it is the merest mere of those two things, at least it had this business purpose: It had a business purpose to see to it that it continues to hold and that what it held continued to have some value.

I mean by that, that on any basis whatever, as you look at the Maine Company, it certainly was within its reasonable business needs to see to it that the eleven million dollars that it had invested in 1929 in Jersey common did not disappear. The smallest duty and the smallest reasonable need it had was the need to protect that eleven million dollars.

And so I say, when we assume that the Maine Company stands at the threshold in 1929 and looks forward, it is clearly within its reasonable means to plan to do something about the Jersey Company when 1940 comes.

Now, there are two things it can plan to do. It can plan to liquidate, or it can plan to extend Jersey. The testimony was that it planned to liquidate, that it had always planned to liquidate. The Board, as I view it, takes the position that we ought to have planned on extending. I wish now to show Your Honors that no matter which plan it had adopted, it did not, as of the end of 1929, have sufficient assets with which to carry out its plan; and I wish to show Your Honors from the little chalk you have before you that during the period here in question, 1928 to 1933, it made no progress in either of those directions.

If Your Honors would be good enough to glance at the chalk that is before you (see this record p. 65), you will observe that on Basis No. 1, which is the basis of liquidation,

as of December 31, 1929, the total of the column of obligations is $30,416,400.

You will observe that the liquid assets available to meet those obligations less the $5,000,000 working capital, are $16,705,100, and that the obligations exceed the liquid assets by $13,711,300.

Then will Your Honors be good enough to look at the column as it appears as of December 31, 1933. In this column the obligations have shrunk somewhat; they are $27,460,800. But, in turn, the available liquid assets have also shrunk, being down to $12,829,900. And the obligations exceed the liquid assets by $14,630,900. And if you will compare those two figures at the foot of the column, you will find that during the period here in question, when this taxpayer is charged with having unreasonably accumulated, the enterprise, as a whole, has actually lost ground on its program of liquidating the Jersey Company.

And now, let me turn, if you please, to Basis No. 2, which, as I understand it, is that which the majority thinks the more reasonable one for the Maine Company to have adopted. That is the basis of extending the Jersey Company in some way, by doing some fresh borrowing and fresh financing, to keep the thing going.

I may say that that alternative had certain advantages in this respect: Some things that have to be paid on the liquidation plan can be postponed on the extension of the life of the Jersey Company plan. But I don't want to pass this point without reminding Your Honors that every expert who testified in the court room agreed that the extension of Jersey was silly and unbusiness-like; that it was silly to keep that extra taxpayer, that inert company, there, vulnerable to taxes and serving no useful purposes; and with these rather fearsome charges of 9 percent on its

common and 6 percent on its preferred; and everyone agreed on both sides that it should be liquidated.

But even taking the extension theory, under that theory on Basis No. 2, the total obligations that have to be met by 1940 are $18,409,000. The available liquid assets in 1929, less the working capital, are $16,705,000. And the obligations exceed the assets by $1,703,900, even on this basis.

In other words, as the company stood at the end of 1929, even if it planned on extending the life of the Jersey Company, if was not yet on safe ground and did not yet have enough funds with which to do it.

Now, glance, if you will, at the next column, at the end of 1933. Again the obligations have shrunk somewhat. On this basis, they are now $16,250,000. And, again, the liquid assets have shrunk and are $12,829,900. And at the end of 1933, the obligations exceed the liquid assets by $3,420,000.

Once again, in the very period in which this company is accused of having unreasonably accumulated, it has really gone backwards. The enterprise, as a whole, has gone backwards, either on the liquidation plan or on the plan of extending the Jersey Company.

Now, why this seeming paradox? Why is it that in a series of years when the Maine Company is accused of having unreasonably accumulated a surplus, I say that the program, the 1940 program, actually receded in view instead of approached in view? There are two answers. One is that cataclysm in the Chicago banks that sucked up ten million dollars of the enterprise, half of which, so the testimony shows, is never coming back. That is one explanation.

The second explanation is that the Maine Company continued its business habit established all through the years, of sucking up into the Maine Company dividends from the underlying companies, whether they were earned by those companies or not.

The consequence was that, while if you look at the Maine Company alone, it seems to be richer, it has become richer only because every other company below that level has become poorer; and the enterprise, as a whole, is worse off in 1933 than it was in 1929.

May I say one other thing, too, as to the last column on these two little chalks? On both sheets. The majority insists that the Maine Company, and thus the enterprise as a whole, should have been approximately eight million dollars worse off in 1933 than appears on this table, because the majority solemnly insists that out of the roughly $9,600,000 of earnings of the Maine Company, only $1,600,000 of which went out in dividends, the majority says the whole should have gone out, so that the last figure on these two sheets, if the majority is right, should have been eight million dollars worse than it is on the sheets I handed up to you.

Now, what did the majority, as I understand the majority, have in mind as to what they think should have been done when 1940 comes? I think the key to it is found in the majority opinion on page 32 (41 B.T.A. 620). On that page Your Honors point out there was approximately $40,000,000 excess of assets over liabilities at the end of 1929. And I think the inference is not only that the Maine Company should plan on extending the life of the Jersey Company, but also it should plan on doing some borrowing if need be, when 1940 comes, to accomplish whatever the Maine

Company finds it must accomplish about the Jersey Company.

I quarrel with the Board to this extent: I cannot believe that it is unreasonable for a concern in the position of the Maine Company to plan to pay debts. I cannot believe that the old-fashioned idea that it is moral to pay debts and moral to rid an enterprise of its debt structure has lost its validity. I think the Maine Company might certainly reasonably plan on paying the debts. But let us assume, as I think the majority intimates, that it should have planned on doing some borrowing.

Again, Mr. Green—and I thank him—reminds me that there is authority in our tax structure for paying debts, and that is found in the personal holding company tax. Even that tax will allow a credit to a taxpayer, if the taxpayer accumulates funds to pay debts acquired before the passage of the Act. And it may pay these debts out of income and Congress saw to it that it may.

But now let me consider this, what I think is the theory of the Board that somebody could do some borrowing in 1940 and I would like to think it through with you. Who is going to borrow the sums here involved?

Certainly not the Railroad Company, that is the traction company. It has been hopeless for years. It has bonds outstanding that are worthless, were it not for the guarantee of the Jersey Company.

Well, certainly not the Harness and Saddlery, that funny little harness store.

Certainly not the Pau Corporation. It owns some easements only.

Certainly not Produce Terminal. Produce Terminal is regulated by the Illinois Commerce Commission. Its rates

are based on its capital structure. Can any one imagine that the Illinois Commerce Commission would have allowed Produce Terminal to borrow money to be swept up-stream in an up-stream loan to the Maine Company? That was impossible.

Certainly not the Railway Company. It couldn't borrow. It is under the Interstate Commerce Commission, governed by it. Not for a moment would the Interstate Commerce Commission permit the Railway Company to borrow for an up-stream loan, as was testified to in the case, and as is clearly so.

Certainly not the Transit Company. Its charter prohibited it for one thing; and, for another thing, the Transit Company is regulated by the I.C.C. just as the Railway. And, for good measure, is regulated by the Department of Agriculture as well.

Certainly the District couldn't have done the borrowing on the scale we must be talking about. It owns Chicago real estate, and testimony is that it was never able to borrow on its own, that in every instance, it had to have its bonds guaranteed by the Jersey Company, and when its serial maturities came along, it had to get the cash from the Maine Company with which to meet them.

Then, who could borrow it? There are just two possibilities, the Jersey Company or the Maine Company.

And what could those two companies offer as collateral against the borrowing? They could offer only Transit stock or Railway stock.

I cannot believe that this Board is so far removed from the realities of life that it does not know that from 1929 forward, that type of issue was in such discredit in this country that it was almost hopeless to put out a collateral

trust issue. Indeed, it is almost hopeless to this very day, except that I have noticed within the last few days one substantial collateral trust mortgage that has gone out. That type of financing had on it the 1929 taint, and it was highly unpopular.

That isn't the only reason the Maine and the Jersey Company could not have borrowed when 1940 came around. There was a cogent reason why they couldn't and that reason was the passage of the personal holding company tax. Both Jersey and Maine, from 1934, forward, have been held by the Commissioner to be personal holding companies. Once again, I think this Board cannot be so far removed from realities as not to know that no personal holding company can now make long term borrowing. And at the risk of explaining the obvious to you, I will state why: As everyone in this court room knows, a personal holding company nowadays must declare out all of its income. It has that choice, or else the choice of letting the Government have 75 per cent of it.

Now, when lenders look about for people to whom they would like to hand out their money, will they so much as give a smile to a personal holding company? They will not; and why not?

They will not, for this reason: No lender, on the scale we are now talking about, will lend to a company that cannot amortize its debts out of its income. And a personal holding company may not amortize out of income for a debt incurred in 1940. If, prior to 1934, as I have said, if it has such a debt incurred prior to 1934, as I have said, it may; it cannot for a debt incurred afterwards.

And so a lender, looking toward a personal holding company, and the only two possible borrowers here were Jersey and Maine, sees this situation. There is no place to go but

downhill for such a company. Whatever it earns, whatever profits it makes, those it must push out. And, on the other hand, if disaster overtakes it, the loan is bad. And on the basis of prosperity, a holding company cannot pay its loans and cannot amortize out; and on the basis of adversity, of course, it cannot.

And so, as events turned out, had the Maine Company in 1929 looked forward to borrowing in 1940, it turns out that it would have followed the path of folly and despair. It could never have done so.

If Your Honors please, what I have said about the reasonableness of accumulating to meet the 1940 situation in some way, seems to me cogent and persuasive. It seems to me that I must at least have made some progress in indicating to Your Honors that with this eleven million dollars at stake in the Jersey Company, that the Maine Company had to do something to protect it and that it had to plan on either liquidating the Jersey Company, or, at the lowest, extending it, and that on neither basis did it have enough funds on hand at the end of 1929, and that on neither basis did the enterprise, as a whole, make any progress towards that end.

But I think, Your Honors, at least the majority have something else in mind. On page 31 (41 B.T.A. 619) the majority points out—

About a dozen or fifteen lines from the bottom of the page.

First, there is a table in the middle of the page and then the next paragraph in the middle, the majority says:

> "As above indicated, the petitioner was obligated to pay off only $3,227,000 of the $23,963,000 bonds outstanding at the end of 1929."

That is to say, the majority points out pointedly that the petitioner didn't actually owe these debts that I kept talking about.

Now, frankly, I didn't think it mattered whether the Maine Company actually owed those debts or not. The reason I didn't think it mattered was this: I was talking about business men and their purposes, their intent, and the way in which they ran a business. It was my hope that as I tried the case I would demonstrate to the Member who heard it, and indeed I did, that there was so cogent a business reason for accumulating to take care of the Jersey situation, that no man in his senses, and no company in its senses, would fail to accumulate and to get in a position to take care of the 1940 crisis.

I think I find, however, that that is not quite satisfactory to the majority. They wish to be shown that there was a legal obligation on the Maine Company to pay off. I will deal with that legal obligation in a moment, but before I leave this, I would like to make one more attempt with the majority. Let me put it to you this way:

Suppose in 1911 what the Maine Company had acquired instead of what it did acquire, was a huge block of real estate. Let us assume, if you please, that it acquired a block of real estate worth, let us say, ten millions; and suppose it paid five millions in cash for it; and that when it took the real estate it was subject to a mortgage of, let us say, five millions.

Now, don't misunderstand me. It is merely subject to a mortgage which the Maine Company doesn't assume and undertake to pay. It is not obligated to.

Now let us assume that after the Maine Company gets the real estate, it places a mortgage of five millions of dol-

lars on the real estate to build five million dollars of buildings and it rides along—that is, the second mortgage.

And let us assume, as would have been the case, that this time it signs the mortgage notes; it promises to pay that five million. It didn't promise to pay the original five million, but simply took the property subject to the mortgage.

Now, as the Board thinks, as it seems to me it thinks, the Board would say it would be all right for the Maine Company to accumulate five million dollars to pay off the second mortgage which it actually promised to pay, because it would be legally obligated to pay it. But at the same time it seems to me they would say, "It won't be all right for the Maine Company to accumulate funds with which to pay off the first five million dollar mortgage because it never really promised to pay it. It was not obligated to pay it."

I hope that the majority will ponder on this for a moment. What difference does it make in the way business men conduct their lives, whether or not the Maine Company, in the case I have put to you, was actually on one note and not on the other? Both were loans ahead of its equity. Both had to be taken care of when they became due, or the equity would disappear.

Now, compare that with the situation of the Maine Company and the Jersey Company; when 1929 came around and the Maine Company had this eleven million dollars invested in Jersey common, it was, as I have pointed out to Your Honors, in substance, the owner of the equity, subject to these mortgages, these charges I have talked about.

And what difference does it make whether it was obligated to pay them in the sense of being legally obligated or not? I never thought it mattered but because it now

seems to me the Board thinks it does matter, I now wish to point out to the Board that the Maine Company was actually legally obligated to pay the creditors and the preferred shareholders of the Jersey Company.

And to do that I wish to call Your Honors' attention to Exhibit S-46, which I take the liberty of handing up, although I don't speak of it pointedly at the moment in the sense that I want your Honors to follow it (handing exhibit up to the bench).

I should like to add that I make this argument to Your Honors, in part, because of a statement of His Honor Member Kern, that appears on page 92 of the transcript of the last hearing. In that argument Mr. Kern asked of my brother, Mr. Clark, if there was any contention that there was a legal obligation on the petitioner at any time. Had Your Honor asked it of me, I should have said there was and I now make that contention, and I assume Your Honor asked that question because Your Honor thought it might be of some importance.

I am now calling your Honors' attention to what is called the "by-pass" agreement, Exhibit S-46, and I am about to call Your Honors' attention to a line of cases.

First, I want to speak on this "by-pass" agreement, so-called. That was an agreement entered into on October 1, 1914, after the Maine Company, as I put it, moved in on the Jersey Company and started to dominate its life.

That agreement was an agreement by which the Jersey Company solemnly agreed that from the date of its execution forward, no income from Transit and Railway should ever reach Jersey; that the Transit and Railway income should be used first to pay the interest on the Jersey Company bonds, its expenses and its taxes, and that thereafter every dollar of it should go direct from the operating

companies to the Maine Company and never touch the Jersey Company treasury.

That is fundamental to what I proceed to argue, and I can't make it too clear. On that date the Jersey Company foreclosed itself forever from ever accumulating any funds to take care of its own financial future.

Now, having pointed out that agreement to Your Honors and the effect of it, I wish to call your Honors' attention to two cases. The first one is *Taylor v. Standard Gas and Electric Company*, 306 U.S. 307. That case is a fascinating case. The facts in it are too complicated and too long for me to state adequately in decency to Mr. Clark, who doesn't want to remain here too long.

Mr. Clark: Oh, that is quite all right.

Mr. Welch: Thank you.

I am confident Your Honors will read it, however, and when you read it you will find that this, at least, was the heart of the situation. That was a reorganization proceeding that got passed on by the Supreme Court of the United States, and involved in the reorganization proceeding was this situation: There was a top company that dominated the life of a subsidiary. I won't go into all the things it did about dominating, but it dominated it, it kept it poor, and finally the result of the domination was that the subsidiary became bankrupt.

In the course of this domination by the top company, the subsidiary became indebted to the top company on perfectly proper transactions to the tune of about five million dollars. And when a plan for reorganization was presented, the plan that was presented gave the top company, in the reorganized concern, a preference over the preferred shareholders of the subsidiary company, because it was a perfectly honest creditor to the extent of five million dollars.

and the lower judge said that it seemed all right, despite all the other sins, that Your Honors will see if you look at the case that it seemed all right that the top company, as the creditor, should be preferred over the preferred shareholders to that extent.

The Supreme Court of the United States said that that action on the part of the trial judge amounted to an abuse of discretion; that he could not be permitted to allow a top company to run a subsidiary into a disaster and assert that it had any standing except a standing below that of its preferred stockholders.

And speaking of what that top company did, some language was used that I found distinctly interesting. I am speaking now from page 323 of the report. Mr. Justice Roberts said:

> "It is impossible to recast Deep Rock's history and experience so as even to approximate what would be its financial condition at this day had it been adequately capitalized and independently managed and had its fiscal affairs been conducted with an eye single to its own interests."

And as I read of that, I thought of the Jersey Company. Can it be said that that company has been managed with an eye single to its own interests? Has not that company been managed with an eye single, really, to the interests of the Maine Company?

And, in the concluding paragraph:

> "No plan ought to be approved which does not accord the preferred stockholders a right of participation in the equity in the Company's assets prior to that of Standard, and at least equal voice with Standard in the management."

And in connection with this case, may I call Your Honors' attention to another case, before I take up this so-called by-pass agreement? And that is the case of *Vallery v. Denver & Rio Grande Railroad Company*, appearing in 236 Federal at page 176.

In the *Vallery* case, as in this case, a top company dominated a subsidiary and a mortgage of the subsidiary became due. The top company allowed the mortgage to go to foreclosure and committed the additional sin of bidding in the property that was foreclosed at the foreclosure sale. Then the subsidiary went bankrupt and a receiver was appointed, and he attacked the sale and the conduct of the top company. The top company was held liable, and I should like to call attention to the language in this case, appearing on page 181 of the opinion:

> "Under the allegations of the complaint, the Denver & Rio Grande, at the time of the several transactions in regard to the pledge and sale of this stock, was a trustee of the assets of the Midland Company so far as the creditors of the company were concerned . . . ."

That is to say, the Court says that when a top company is indifferent and callous as to what happens to a subsidiary, and if its subsidiary goes into bankruptcy, the top company becomes a trustee of every dollar that it ever took out of the subsidiary; and the two cases together hold that that top company must hold in trust whatever it took and must see the subsidiary through when the crisis comes.

One more sentence from the *Vallery* opinion:

> "It was the duty of the Denver & Rio Grande to make every effort to prevent a foreclosure and sale of the pledged stock."

Similarly, under the doctrine in those cases, it was the duty of the Maine Company to see to it that no mortgage on Jersey collateral was foreclosed, and to see it through when the 1940 crisis came.

Now having called your attention to these two cases, I wish to call Your Honors' attention to only one other thing and then pick up the agreement of which I am talking. In 6 Fletcher's Corporations, page 716, this doctrine, of which I have been speaking to you, is put in this way:

> "The holding company is bound to act in the utmost good faith towards the creditors of the held company, and must make every effort to prevent a foreclosure of the latter."

In view of this law that I have stated to Your Honors, I should like now to pick up and call Your Honors' attention to one or two clauses in this by-pass agreement, as we have called it. Exhibit S-46.

The document has some recitals in it, and the last recital is this:

> "And whereas the parties hereto desire to simplify their financial relations and operations for their mutual benefit and protection of the various creditors, holders of securities, and shareholders, respectively."

That is to say, there is a recital in the document that those who drew it and executed it had in mind the claims of creditors and shareholders, and so forth. That appears in the Whereases, and then in the contractual part, this phrase:

> "All income of the New Jersey Company hereafter received or collected by it from any source whatever, shall be by it applied first to the payment of its own expenses; second, to the payment of all taxes payable

or chargeable to the New Jersey Company; and the surplus then, if any, remaining, shall be paid to the Maine Company upon its request, but subject, however, to any agreements or obligations on the part of the New Jersey Company now existing."

Listen to those words precisely like the words in a mortgage—

"subject, however, to any agreements or obligations on the part of the New Jersey Company now existing."

Then, at the last of it, there is this delightful phrase:

"The President or Treasurer of the Maine Company and of the New Jersey Company, respectively, may, from time to time determine all questions which may arise relating to the accounts between the said companies, and may make such payments from one company to the other, as may be necessary or convenient, in order to carry out the true intent and purpose of this agreement."

The contract is signed on behalf of the Jersey Company by Frederick H. Prince, its President. That is the same Mr. Prince who we all know is the President of the Maine Company. Imagine Mr. Prince as President of the Jersey Company, meeting himself as President of the Maine Company, and arbitrating any difference between the two companies that might arise under this contract. Isn't it obvious that when that contract went into force, that the Maine Company simply paralyzed the Jersey Company, simply made it impossible for it ever to have an independent economic life, and made it impossible for it to meet its bonds when they became due, or to do anything for its preferred shareholders? And since that contract had that effect, I say to Your Honors that as Jersey earnings went into the Maine Company, they went in subject to a charge,

as was spelled out in the contract and as was spelled out in the doctrine of the cases to which I called Your Honors' attention; so that as each dollar reached the Maine Treasury, it was fastened with a duty and the charge of a trustee to see the Jersey Company through.

I think I make it clear that I do not claim, Mr. Clark, that the Maine Company put its own capital behind this guarantee. I only say that as it sucked it up—the income—every dollar that came out was impressed with what the Vallery case calls the "trust", and that the Maine Company could not have pushed it all out to Mr. Prince and not have become liable, if it had done so; and Mr. Prince, in turn, would have become liable.

And let me say this: That this is no fantastic thing I am discussing with Your Honors.

I shall go almost from this court room, a Federal court room, to another Federal court room, in which a minority stockholder of the Jersey Company is asserting the very point that I now assert to Your Honors. I should be grateful, indeed, if Mr. Clark could furnish me with any legal answer to make to him. I am grateful for one thing. I am grateful that I am able to point out that the Maine Company did see the Jersey Company through; and that when it came time to have its debts paid and its preferred stockholders paid, the Maine Company was in funds with which to do it and it stood by and saw the Jersey Company through.

Now, if my troubles in this case—which I have never been able to understand—but if they were in any sense due to the fact that the majority thought the secret of their decision was that the Maine Company was not obligated to pay the Jersey charges, I beg of you, read these cases to which I refer, read this by-pass agreement and I am confi-

dent that if only that is needed to turn this decision my way, the turning will come quickly.

I want to take a moment to call attention to something in this case that so far seems to me somewhat lost sight of, and that is the Regulations that apply in a 104 case. They are ancient, as we all know. They have great force because of the fact that they are ancient. And may I point to what I think is important:

> "When one corporation owns the stock of another corporation in the same or a related line of business, and, in effect, operates the other corporation, the business of the latter may be considered in substance, the business of the first corporation. Gains and profits of the first corporation put into the second through the purchase of stock or otherwise, may, therefore, if a subsidiary relationship is established, constitute employment of the income in its own business. To establish that the business of one corporation can be regarded as including the business of another, it is ordinarily essential that the first corporation own substantially all the stock of the second. Investment by a corporation of its income in stock and securities of another corporation is not without anything further to be regarded as employment of the income in its business."

I am reading, of course, from Article 542, of Regulations 77—and they are familiar, I am sure, to all Your Honors.

Is there any doubt that the Maine Company and the Jersey Company were in the same or related lines of business? Let us think for a moment. Whenever a cow or a hog went into the stock yards at Chicago and paid 35c for hotel accommodations, the Jersey Company smiled because it meant something to the Jersey Company; and the

Maine Company smiled because it meant something to the Maine Company.

If a car of freight was loaded on the railway, it meant something to both. Is there any doubt about their being in the same or related lines of business?

Both are holding companies. Both look ultimately to what happens in Chicago. And we are right squarely under the Regulations, unless it be the clause where it says, "It is ordinarily essential that the first corporation own substantially all of the stock of the second." "Ordinarily"—not "necessarily".

But don't we own substantially all of what counts? The common stock? And, after all, isn't the key to the Regulations the domination of the one company by the other? Isn't that what counts and doesn't that situation exist here?

And so I say that in reconsidering this case, I would be grateful, indeed, to the majority if it would again seriously consider these Regulations. I think they have a very important bearing on this case.

Now, I have argued that the Maine Company is not a mere holding company, and that Your Honors should change that finding and give me mine. I have argued to Your Honors that the Maine Company did not unreasonably accumulate, and that Your Honors should change that language and should give me mine.

I now go to the last finding of all, and I ask that that be changed. I approach that from this point of view: If I fail to convince you on the mere holding company point, and if I fail to convince you on the reasonableness of the accumulation, what have I then done? I have then left the case with two presumptions present. I don't at all say that I should be in that position. I don't think either presumption is in the case; but assuming I fail to move you,

what is the result? The result is that as you approached the decision, there were two presumptions that arose, one from mere holding, and one from unreasonable accumulation. But the presumptions were there only momentarily. They disappeared when evidence was put in. And the case was entitled to be considered and in the end, the Board did consider the case free of presumptions.

The law about the disappearance of presumptions I think is so clear I need scarcely state it, but I would like to call attention to two cases. One is *New York Life Insurance Company v. Gamer*, 303 U. S. 161, and I am calling attention to portions of the opinion that appear on pages 170 and 172. I choose this case because it is a Supreme Court case. It deals, however, with a presumption different from the one we are dealing with here, but one of equal validity. That was a case where a man obviously died from accidental means. The beneficiary of an insurance policy brought suit against the insurance company and there was a fight between the plaintiff and the defendant about a presumption. The presumption there involved was the ancient presumption, one of the most well-founded in law, and that is that, granting a violent and accidental death, the presumption is that a man died from natural causes, that is to say that always the courts will say they will not presume that a man committed suicide. For once and for all, the Supreme Court did away with the idea that the presumption had any validity left after evidence was introduced. And I would like to read a paragraph from the opinion:

> "Upon the fact of violent death without more, the presumption, i.e., the applicable rule of law, required the inference of death by accident rather than by suicide. As the case stood on the pleadings, the law required judgment for plaintiff. It was not submitted

on pleadings but on pleadings and proof. In his charge the judge had to apply the law to the case as it then was. The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed."

More in point, because dealing with the actual case here involved—I mean, the actual point here involved—is the familiar case of the United Business Corporation. I think all of Your Honors know it by heart. The reference is 62 Federal (2d) at page 754, where Mr. Justice Hand said:

". . . but the test remains the state of mind itself, and the presumption does no more than make the taxpayer show his hand."

That is to say, when we came into the court room, when this petitioner came into the court room and showed its hand, the presumptions disappeared. And it was then the duty—and I must say the Board faced the duty—it was then the duty of the Board to deal with the case free of presumptions.

I have been going for some time; I would appreciate a very moderate recess.

Member Smith: Yes, certainly.

(Brief recess.)

Mr. Welch: If Your Honors please, I now reach the last section of my argument.

Unhappily, it comes when I am tired. I should like to suggest that I might have Mr. Clark's agreement and Your Honors' permission to edit what I say somewhat freely from this point on, before this transcript is printed, and

unless there is some objection to it, I would appreciate that agreement.

Mr. Clark: Oh, I see no objection to that, Your Honors.

Member Smith: No, there is no objection.

Mr. Welch: In view of what I last said, I think it is the law that when the taxpayer shows his hand and when the taxpayer develops, day after day, for two weeks, a record as was developed here, these presumptions do disappear.

I suggest that the last sentence appearing at the end of the paragraph, ending at the top of 41 B.T.A. 621, where the majority says, "and we think that the evidence has not overcome the presumption" is inadvertently inaccurate. I do not think the taxpayer had the burden of overcoming the presumptions. The presumptions had disappeared, and I think what the majority said was inadvertent.

I don't quarrel with it greatly because the Board did what it should do. It went ahead and considered the case free of presumptions. And it was not, in fact, until I reached that portion of the opinion that I began to read it with great eagerness and with great interest.

I now wish to deal with the opinion, beginning with the third paragraph on page 621 of the opinion and that is at the paragraph beginning with these words:

> "Even without the benefits of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose."

As I have said to Your Honors, I have read that paragraph and the following ones with the utmost interest. Here, at last, the majority was considering the case, as under the law I think it must consider it, that is, free of presumptions.

May I read that paragraph?

"Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932."

If Your Honors please, I am in a somewhat ungracious position at the moment. It is my unhappy duty to say that I think that paragraph is really full of error. May I read it, clause by clause, and explain to Your Honors why I feel that way?

The clause says, "Even without the benefit of the statutory presumptions, we think" and so forth; and then begins "The bare recital of the undisputed facts relating to the organization of the petitioner."

If Your Honors please, how can the facts about the organization of the petitioner reveal this nefarious intent? The petitioner was organized in 1911, before an income tax was ever heard of, or, indeed, before there was a constitutional amendment that permitted one. I had supposed the strongest fact I had on my side of the case was the fact that the petitioner was organized as it was and when it was.

The next clause, "the balance sheets"—

Balance sheets show assets and liabilities. What do they reveal about actual intent, actual purpose? The most

that Mr. Clark could do with a balance sheet would be to make an argument that a company's assets exceeded its liabilities. But if he made that argument, he would only tend to show that the corporation had accumulated, and would only get himself back into the presumptive field, which Your Honors have just promised you would leave behind.

"The source of earnings"—What does the source of earnings reveal about the actual purpose of the Maine Company? As the Government attorney points to the source of earnings, what comfort can he get out of that, except to show that the petitioner was a holding company, and that the source of its earnings was held securities?

And if he did that, he would only put the case back into the presumptive field, the presumption following from its being a holding company.

"The nature of the investments"—And once again, do they reveal anything about actual purpose of human beings? No. Nature of investments would only show, again, a holding company situation, once again the presumptive field which the majority has left in this section of its opinion.

The next clause is "the large accumulations of cash and surplus"—And that, I take it, is only once again to give Mr. Clark the opportunity to argue that the company had unreasonably accumulated, from which he would seek to raise a presumption, a presumption now left behind.

"The loans of cash and securities to the petitioner's sole stockholder"—And here I agree the Board or the majority has said something that under the cases has something to do with actual intent, and with that I will deal later.

And one more, "the continued reinvestment of its gains and profits in securities," which, once again, is only to point out that the petitioner is a holding company, and once again to put us back into the presumptive field.

All these things, says the Board, or the majority "present, in our opinion, a situation typical of situations which Congress intended to cover by section 104."

Now, may I at this point skip one paragraph and call Your Honors' attention to the fifth paragraph on page 624 of the majority opinion.

> "The petitioner was the means by which Prince had succeeded in accumulating up to 1929 a personal fortune of between $15,000,000 and $20,000,000 practically immune from taxation; for the income of the petitioner consisted almost exclusively of dividends received from domestic corporations which were a legal deduction from its own gross income. The result was that the petitioner had in many years no taxable income, and in other years only a small taxable income."

And may I link with that paragraph the fourth paragraph on page 620 of the opinion at which Your Honors are looking, reading:

> "Under his program Prince, through the instrumentality of the petitioner, would own in 1940 all of the assets of the Jersey Company and its subsidiaries, of a value of more than $60,000,000, free of debt."

I think, if Your Honors please, that the two paragraphs which I last have read, present what in the first paragraph that I read the Board considers a typical situation which Congress intended to cover by section 104. What the two last paragraphs seem to me to say is this; it seems to me that the majority says, "Well, Mr. Prince under this program is just getting too rich and is paying too little taxes."

I think in some way the Board senses this feeling that Mr. Prince did not bear the equitable share of the tax burden that a man should bear. To put it in the language of a man on the street, I think the Board feels that when Mr.

Prince, as the majority thinks, got so rich and paid so little, I think the majority feels, "There ought to be a law against that." That is the common reaction of the people on the street when they see a situation that for some reason or other they don't like.

Now, if Your Honors please, beginning in 1934, there was a law against that. That is the personal holding company law. That is a law against that. But since that law was not available in the years herein considered, I think the Board, the majority, with this feeling it had that Mr. Prince did not pay enough taxes, first felt there ought to be a law against that, and then felt, "Well, 104 must be a law against that."

And I think that the majority has applied 104 against this petitioner as if 104 equalled the personal holding company tax.

What makes me say that is this: There is no dispute between the gentlemen who sit at that table and us who sit at this table on this proposition, that, beginning in 1911 the Maine Company formed a purpose and that it unhesitatingly and undeviatingly followed that purpose straight through the years.

Now I wish to state that purpose with boldness. That purpose was, first, to acquire an equity position in the Jersey Company and ultimately to own the assets of that company free and clear.

I state that with boldness. And that purpose of the Maine Company continued unchanged throughout the years.

Now, 104, if Your Honors please, does not tax a situation, to use the wording of the majority opinion. The Personal Holding Company Act does. That is to say, the Personal Holding Company Act says, "If you have a closely held corporation and it accumulates, the tax is imposed."

That is just all there is to it; that is the situation.

However, 104 says something entirely different. In 104 you may have a closely held corporation. You may have a mere holding company, if you please. It may accumulate. But that corporation is not subject to this tax unless it has an actual intent to avoid surtaxes on its shareholders.

It must be conducted with a purpose to avoid taxes. To put it in the vernacular, the corporation must be run with the dominant idea of cheating the Government out of surtaxes.

Now, this company, I cannot point out too often or too strongly to Your Honors, was formed long before there was a tax, and long before 104 was ever heard of. Its purpose was formed, and that purpose was steadily adhered to through the years.

I say to Your Honors that Congress, if it wished, could tax a situation, and it did so, in the personal holding company tax. But there is one thing that Congress cannot do and that is it cannot change men's minds.

If Mr. Prince's purpose in running the Maine Company was to continue unbroken, straight through the years, no act of Congress could change that intent.

It used to be the law until this case was decided—meaning the case at bar—that if a corporation were not formed for the purpose of and had a history of being run without the purpose of cheating the Government out of surtax, it used to be the law that such a corporation had to make an abrupt change in its corporate purposes before it came under section 104. I like the way it was put in the Spitzner case which appears in 37 U.S. Board of Tax Appeals Reports, page 517, and I am reading from page 519. Speaking of a corporation which started out with an ordinary business purpose and traveled along in that way, the Board said:

> "However, the stockholders of that kind of a corporation might bring their corporation under the lash

of section 104 by diverting it from its normal business activities and intentionally using it during any taxable year for the purpose of preventing the imposition of surtax upon themselves through the medium of permitting its gains and profits to accumulate instead of being divided."

That is to say, until this case was decided, it used to be the law in this room, and in the Board, that if you had a corporation which started with an ordinary, a proper, business purpose, and there was no evidence of any change in that purpose, such a corporation is not affected by this Act.

Now, what has the majority done? It has done this: It has taken a corporation that never changed its purpose, that pursued this undeviating policy of investing more and more in the Jersey Company with a view, as I have said openly and boldly, first to acquire an equity ownership in it and ultimately to own it all. The Board has taken that corporation, which never changed its purpose, which always conducted its business in precisely the same way, and has said:

"We simply declare that its purpose was changed. We simply declare that 104 equals the personal holding company tax and we feel so deeply that there is something wrong in a tax situation that will let a man accumulate what we think is so large a fortune as we think Mr. Prince has, without paying any more than he did along the way, that we are simply going to say we don't care what your purpose was; we are going to say we are going to tax that situation."

And the situation, as I have pointed out, is this situation: The situation of a man, as the Board believes, having become rich and having paid too little along the way.

And there is something worse than that about it. When

the Board decides to impose this tax precisely as the personal holding company tax is imposed, the Board imposes this savage tax without the consideration Congress permitted taxpayers in the personal holding company tax. That is to say, in the personal holding company tax, Congress said, "We will permit any company to accumulate its earnings to meet existing debts, and accumulate them out of income, and we will not tax them."

And the Board, when it makes 104 equal to the personal holding company tax, as I suggest it does in this case, and puts on this savage tax, it doesn't even give the taxpayer the treatment accorded to it by the Personal Holding Company Act and allow it to accumulate out of earnings to discharge existing debts.

When this case was tried, day after day we demonstrated to the member who heard it, the purpose of the Maine Company, as I have indicated to Your Honors, and he became convinced, as in the end the majority as well became convinced, that the purpose was a single, undeviating purpose.

And I remember a most acute question asked of Mr. Clark, by Mr. Sternhagen. And had I the power I would ask him now.

Mr. Sternhagen, in this room, said to Mr. Clark, in substance:

> "This company started out sinless; it ran along sinless. Tell me, when did its purpose change? When did it become this sinister, sinful device used only to escape surtaxes?"

And Mr. Clark made the most astonishing answer*, and

*The reference is to page 1161 of the transcript of the hearing where the following appears:

"The Member: You dealt with the question that it was admitted that it was not formed for the purpose stated in 1911. I would like to know whether, since the Government, as I understand it, does contend that this corporation was during the taxable years availed of for the purpose as set

I wonder if he would make it today. He looked at the Member and said, "I think the purpose changed when the first loan was made to Prince."

The first loan was made to Mr. Prince in 1911. The only suggestion as to when there was a change from an ordinary business purpose to a sinister purpose, was the suggestion that it changed when the first loan was made, and that was in 1911, when it was totally impossible for anybody to have a sinister purpose in escaping taxes.

This tax gets imposed on this taxpayer in a section of the majority's opinion in which it says it is dealing with the case free of presumption. But in imposing the tax, the Board makes the most violent presumption. It presumes that the intent with which the petitioner was run actually changed when there wasn't any evidence whatever that it did change, and when, as we now know, and everybody agrees, minority and majority alike, that the purpose all through was the purpose of coming to be the owner of the Jersey Company and to free that company of its incubus of debt when 1940 arrived.

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forth in subdivision (a),—I would like to know whether the Government has formed an opinion as to when the purpose—it says it was availed of in the taxable years here in question, came into its history since it was not formed for that purpose, that is to say, there must have been a time between the early years when it was formed for some other purpose and the taxable years when it is said to have been availed of for the condemned purpose, when the purpose changed so as to bring it within the statute. Did it change only in the taxable year 1930, or was it in the taxable year availed of, as it had been availed of for years before, and, if so, when?

"Mr. Clark: Well, I cannot point Your Honor to the precise year, but I would say unquestionably it was availed of prior to the taxable years, in this regard, at least—that is, loans to Mr. Prince, who was its stockholder during those years. That had been going on for years. I haven't the precise figures.

"The Member: Well, that answers my—that is, the earmark of the applicability of the term 'availed of' is the fact of loans made to its principal or sole shareholder, so that whenever that began the Government's position is that at that time there began the period when this corporation was availed of for the condemned purpose. Is that the idea?

"Mr. Clark: Yes, sir."

The first loan by the petitioner to Mr. Prince was made in 1911! Exhibit 8-65.

Now, I want to go fairly rapidly over the other paragraphs in the opinion.

I have skipped in the argument that I have made so far the paragraph on page 621, beginning, "It should be borne in mind that the petitioner was solely owned by Prince."

I wish to comment on that paragraph for two reasons—firstly, because it has to do with the National Grocery Company case, which I think any lawyer standing where I stand ought fairly to face.

But before I deal with the National Grocery Company case, I should like to point out the sentence:

> "It was of no moment to Prince whether the earnings of the petitioner were carried in his individual pocketbook or in his corporate pocketbook."

I assert, in view of the argument I have here made to Your Honors that it was of the greatest moment to Prince where these funds were kept. It is the law in this country, as I have stated earlier in my argument, that when the Maine Company took the earnings of this emasculated Jersey Company and left it helpless, to take care of itself, take care of its own fate, that a trust was imposed on every dollar the Maine Company took.

And had the Maine Company, in turn, passed that money on to Mr. Prince by way of dividend, in turn he would have become liable to the creditors of the Jersey Company and its preferred stockholders.

It is not accurate to say it was of no moment to Mr. Prince. Had he swept all this money out of the Maine Company as the majority seems to think he should have, he personally would have faced the suit in Boston that the Maine Company now faces about which I spoke a moment ago. But not only that. It was of plenty of moment to the

Jersey Company and to its creditors and stockholders, whether or not the money was kept in the Maine Company. It was of plenty of moment to the Maine bondholders whether or not the money stayed. And it was of plenty of moment to Mr. Prince's fellow directors if they allowed that money, impressed with this trust, as I have argued to Your Honors, to leave that company. All of them would have been personally liable.

Now for the National Grocery Company case. The situation here is not analogous to the National Grocery Company case, to the situation in that case. I wish to read the sentence from the Grocery case that is quoted in the opinion and to go back for a moment to the argument we had about it in this court room before:

> "Since Kohl was the sole owner of the corporation, the business would have been as well protected against unexpected demands for capital, and assured of capital for the purpose of any possible expansion by his personal ownership of the securities as by the corporation's owning them."

In the Grocery case, let it never be forgotten that there was no debt anywhere in the picture that had to be faced. In the case at bar let it never be forgotten that there were all these millions of debt in the Jersey Company that had to be faced.

The key to the Brandeis dictum, I respectfully suggest to Your Honors, is in the words "unexpected demands". Can there be any suggestion that the demand for capital in 1940, in this situation, was unexpected? Just as surely as the clock ticked, just as surely as you turned over the pages of the calendar, the time approached when there had to be funds to take care of the Jersey situation. It is beside the point to talk about unexpected demands for capital.

Member Opper: There, right at that point, Mr. Welch, isn't it true that the Jersey Company had tremendous assets, including, for instance, a railway lease from which it was getting two million dollars each year; and wouldn't those assets have been available for the payment of the bonds if there had ever been any need for them?

Mr. Welch: Certainly Your Honor has not forgotten my pointing out today how if the Jersey Company had been cast adrift, they would have been foreclosed on and been sold. Or if Your Honor thinks they should have been borrowed on in 1940, I trust you have not so quickly forgotten my argument that when 1940 came it was impossible for holding companies, such as Jersey and Maine, to borrow. The point is that the Maine Company was, in fact, a trustee for the Jersey creditors for whatever sums it took out of the Jersey Company.

If you wish to imagine that it had a right to gamble with its own future as to whether or not it could refinance Jersey in 1940, possibly it had that right. But in so far as it was the trustee of these huge funds which it had sucked up from this helpless company, it could not, as a trustee, gamble, when it was its duty to see the Jersey Company through.

Member Smith: Would you say the Jersey Company was in a worse condition in 1929 or 1933 than in 1915?

Mr. Welch: The point is that it had not been allowed in all that time to take care of its own bonds, with every nickel of its earnings sucked up to the Maine Company.

Member Smith: They were the earnings accrued subsequent to 1914.

Mr. Welch: In 1914 or 1915, probably what you say is applicable, the Jersey Company wasn't then a personal holding company as it became in 1934.

I think it would be fair to say back in 1914, or 1915, it

is reasonable to look forward to the Jersey Company borrowing on these huge assets in 1940. But when 1929 to 1933 came around, and we are in the depression we are in, I am only saying to you, can you brand the conduct of the Maine Company as unreasonable when it says, "I can't take a chance. This company is responsible for seeing the Jersey Company through. I am going to have the cash available. I am not going to be criticized by creditors, and I am not going to be criticized by preferred stockholders."

I don't say that, looking forward in 1929, it would have been insane to hope to borrow in 1940; as it ultimately turned out to be impossible. I only say, don't, on the other hand, brand the conduct of the Maine Company as insane or folly when it says, "We will be conservative and see that there is money in the enterprise to take care of these debts."

That is all we are talking about. Surely it can't be folly or insanity in the Maine Company to be cautious and conservative particularly when events prove that had it relied upon the borrowing capacity of the Jersey Company or even of itself, when 1940 came around, it would have been cruelly cheated of that possibility by the passage of the Personal Holding Company Act.

Member Smith: The Personal Holding Company Act is in the Act of 1934?

Mr. Welch: That is correct.

Member Smith: And that is after the years we are concerned with?

Mr. Welch: That is right. I am only pointing out to Your Honors if the Maine Company had expected to do some borrowing in 1940, by the cruel circumstances of the passage of the Act, that became practically impossible when the time came. I hope Your Honor sees that, and I hope you will understand with me that lenders just won't lend to a personal holding company nowadays. There is no hope of their

getting their money back. The personal holding company simply cannot accumulate for amortization, or anything else. And as I said in my argument, the only thing that can happen to a personal holding company borrower is that it can't go up, and may go down.

Member Opper: You have made that statement a number of times and I have wondered at it each time, and I am still wondering why it is you say this thing had become so impossible. You say they can't accumulate. You don't mean exactly that, do you?

Mr. Welch: Practically it comes to that. I have watched the officers of this company go around and approach insurance companies and banks and ask for loans, and I know, as a practical matter.

Member Opper: You are not suggesting there is anything in the Personal Holding Company Act or the personal holding company section that says it is illegal—

Mr. Welch: Oh, not at all.

Member Opper: —to use funds for the payment of indebtedness?

Mr. Welch: Oh, no. I am only telling Your Honor something I think you can see, and that is that when one of these companies goes and says, "Come and lend me money," they can't get it.

Member Opper: The bank says, "We have got to have the guarantee of your 80 percent stockholder, because you have got to declare this money out in dividends,"—isn't that what the bank says?

Mr. Welch: They won't touch it.

Member Opper: Of course, your experience with banks is something I am perfectly willing to accept on your statement. But when you place it on the basis of something we all know about; namely, a statutory provision, then it seems to me I have to have a little more explanation than just

the statement on your part that it is unlawful to accumulate earnings.

Mr. Welch: Well, I have no right to ask Your Honor to take what I say and make some decision in a case because of something I tell you about, myself, about trying to borrow money. Don't misunderstand me. I am only asking you to consider the possibility of either the Maine or Jersey borrowing, in the face of the Personal Holding Company Act. And just put yourselves—you know the law so beautifully—just put yourselves in the position of a possible lender, who sees that the company may go bust, and that no matter how prosperous it is, it has got to push out all of its earnings to its stockholders, or else give 75 percent of that to the Government.

Mr. Green says it is worse than that, that it is over 82½ percent today.

I am only suggesting that you think about the law and those things, as would a banker, if you will, and see if there isn't the utmost cogency in what I say to you.

The bankers just don't like it and don't want that kind of business.

Member Opper: Even with the guarantee of the stockholder, who is the same fellow that gets the money that otherwise the corporation would have in its treasury?

Mr. Welch: What I have said is still true and it is true because we are talking about long term financing, naturally. I think we are in perfect agreement, and you have got to have perfect agreement, and the thing is something that has got to be sold to the public.

Now, does anybody in the world have the slightest interest in the personal guarantee of a man named F. H. Prince, who is 80 years of age? Certainly nobody can imagine that guarantee being the sort of thing you can go out and sell securities on in the market. I only say to Your Honors, life

isn't like that. You can't sell in today's market the issue of a personal holding company.

I don't ask you to decide this case on my assertion, but I do have a right to ask you to consider the fact and see just how difficult, if not impossible, it is for a borrower ever to pay off, and then make up your own mind whether or not anybody will lend to that kind of a company.

Now, to go back for just a moment to Mr. Brandeis' dictum about unexpected demands for capital, will you think for a moment of this case?

Let us assume you have a machine tool company which in the year 1939 has a million dollars of profit. Let us assume that in December of 1939 it makes a contract by which it agrees to build and equip a plant in the following year, costing a million dollars. It happens this isn't a purely imaginary case. A case very much like it has come to my personal attention.

Does anyone think that Mr. Brandeis, himself, would require that machine tool company in December to push out its million dollars and then call upon its stockholders for a capital contribution in January to enable it to carry out its contract to build its building?

It is difficult for me to speak for Mr. Brandeis, but I just can't imagine his thinking there would be anything wrong with the corporation's retaining, over the 31st day of December, the million dollars which it has got to start spending to pay a contractor for a plant in the following January.

That example, it seems to me, shows again the importance of the words in Mr. Brandeis' opinion, "unexpected demands for capital."

In the Grocery Company case, there was no expected demand for capital. It was a case about which this dictum might reasonably have been spoken. In the case at bar

there was the most certain demand for capital. And so I say that dictum is certainly far from controlling in this case.

I now wish to call attention—and I have only two or three more paragraphs to call attention to—to call attention to the first paragraph on page 622, of the opinion.

That is the paragraph that was dealt with by Mr. Green in this court room when we last met here, and I think I need not refer again to that argument. I think it is fair to say that the upshot of that argument was that the feeling was on Your Honors' side of the bench, as we felt on this side, that that particular paragraph has no place in this opinion.

Now, the paragraphs that are second, third and fourth on page 622 deal with the loans to Mr. Prince. As I pointed out, when I discussed the first paragraph as to what the Board had to say when it began to consider the case free of presumptions, what it said in that paragraph about loans to stockholders is in order.

If a stockholder in a corporation like this one takes down from his corporation money in the guise of a loan instead of in dividends, and uses the money for his own purposes, to eat and drink and run a yacht on, and have a gay time, I am quick to agree that that is some evidence of the nefarious purpose. The loans, however, in this case, were in no sense of that character. The evidence about them is clear and undisputed.

There was one tiny loan, tiny on the scale on which we are here dealing, from the Maine Company to Mr. Prince for a personal purpose, and that was the loan of $160,000 to buy his Newport house, a loan made temporarily only, until he could sell his Boston house. All the other loans had nothing to do with making Mr. Prince better fed or better clothed or having a longer ride in his yacht. In every in-

stance the situation was one in which the Maine Company wished to see some end accomplished that could not be accomplished by itself, and where the intervention of an individual was necessary. The money could just as well have gone to somebody other than Mr. Prince, so long as that person held an equally important position in the financial world, and every end that the Maine Company sought to achieve through the loan could have been achieved.

The loans to Mr. Prince, both of cash and securities, as the record clearly shows—and there is no dispute about it—were in no sense made as a substitute for dividends.

Mr. Sternhagen is entirely correct about it. They had no significance in the usual sense, and there is no point in discussing those loans in this case. And, indeed, it is not in point to discuss the Grocery Company case which told about loans being taken down for the personal uses of the stockholder and as a disguise for dividends, which he really needed, but wouldn't take in the form of dividends, because he didn't want to pay the taxes.

That just isn't the situation here. If there had been five millions of dollars of loans to Mr. Prince for the reasons suggested in the Grocery Company case, this case wouldn't even have been tried. But there never was the slightest difficulty about those loans in the minds of anybody. We all knew, as the majority knew and as Mr. Sternhagen knows, they weren't the type of thing in any sense that has the significance of the loans in the Grocery Company case.

Now the paragraph beginning on page 622 of the opinion, which has to do with the year-end sales by Mr. Prince to the Maine Company. Tired and somewhat husky as I am, surely it is sufficient to point out to Your Honors that in the Farish and in the Trico cases it has now become the established law that those things have no significance and no place in this kind of a picture.

Two more things and I am done. When the Board reached this portion of its opinion, I would have been happier if the Board had considered what seems to me one of the most cogent bits of evidence on what the actual intent in this case was, and that evidence appears on the chalk that I handed to Your Honors this morning in connection with my request for an additional finding of fact under 18 (see p. 22 of this record). It is the one on the single sheet heavily covered with figures.

I am so near to being done, that Mr. Green is so kind as to say he will make this segment of my argument, and I will take up what else I will say.

Mr. Green: I think all Mr. Welch wants me to deal with and all I propose to deal with are the figures which are the foundation of his argument. If you will look at finding No. 26, which appears upon page 602 of the cited copy of the opinion and on page 13 of the pamphlet copy, you will see that in 1933, that there is a table showing—about in the middle of page 602—the net earnings of the Maine Company for all the years involved in this case, the dividends paid and the excess of net earnings.

That table shows that in 1933 the Maine Company had net earnings of $2,243,000 and paid dividends of $400,000, leaving an excess of $1,843,000—and that excess, of course, is the amount upon which the tax in this case is based. I think we are all familiar with the source of those earnings. Those earnings were the monies that the Maine Company had, as Mr. Welch expressed it, sucked up from the Transit Company and the Railway Company for the most part. All of the Transit and Railroad Company earnings were included in the composition of those earnings.

Now, if you will look again at finding 29, which appears on page 605 of the opinion in 41 Board of Tax Appeals and it appears on page 16 of the pamphlet opinion, right at the

bottom of that page in the cited opinion is shown the net income of the Transit Company for 1933, and the dividends it paid. The Transit Company in that year had a loss of over eight hundred thousand dollars, but nevertheless pushed up dividends which went into the pocket of the Maine Company in an amount of $1,716,000.

Again, if you will look at that part of finding 29 which deals with the earnings of the Produce Terminal for 1933. That is on page 606 of the cited opinion and on page 17 of the pamphlet copy. There it will be seen that in 1933 the Produce Terminal had an income of slightly less than thirty thousand dollars, but it nevertheless paid dividends directly to the Maine Company, which then owned all of its stock, of $200,000—or paid dividends $170,000 in excess of its earnings for the year.

Nobody could have been at all critical if the Transit Company had failed to pay any dividends for 1933. It had no income but, indeed, a loss of nearly a million dollars. And certainly no one could have been critical if the Produce Terminal had paid dividends of all its income, about thirty thousand dollars, instead of the $200,000 it did pay.

If the Transit Company had paid no dividends in 1933, and the Produce Terminal had paid only $30,000 instead of $200,000, the Maine Company's net earnings for 1933, instead of being $2,243,000 would have been less by $1,716,000 plus $200,000 minus $30,000, or less by $1,886,000. And if you do that subtraction, you find that the Maine Company's net earnings before it paid any dividends would have been $356,090. And it paid $400,000 in dividends that year.

In other words, if the Maine Company had taken no dividends from this Transit Company, which was losing money and had taken all of the earnings of the Produce Terminal for the year, instead of having an excess of earn-

ings, it would have paid out in dividends some $44,000 more than its earnings.

Mr. Welch: Thank you, Mr. Green.

I am grateful to Mr. Green for making those figures so clear, because they seem to me so cogent.

We are now in a year in which the majority by hypothesis says, "The Maine Company is no longer run as an honest, ordinary business concern. Its purpose has now changed. Its dominant purpose now is the purpose to cheat the government out of surtaxes on Mr. Prince." Let us not forget that. In that year it is implicit in the Board's decision that the Maine Company is now run for the dominant purpose of saving Mr. Prince income tax. Now think for a moment, if that is its purpose, if that is the way it is being run in that year, can anyone this side of Heaven tell me why it should have sucked up from the underlying companies that huge sum of money and laid itself open to this tax?

If the Maine Company is run with the purpose of saving Mr. Prince surtaxes, as the majority says it was, wouldn't the Maine Company, with that dominant purpose in mind, telephone Chicago and say, "Sh-h-h, Boys; don't send up any dividend this year. We don't want to pay surtaxes." And telephone Produce Terminal, "Lay off the dividend this year, Boys. I am running this corporation this year to save surtaxes. Don't send up any dividends."

It seems to me so cogent I can't see how the Board could possibly overlook it or fail to see the significance of it. If the Maine Company is being run for the nefarious purpose in the year 1933, what possible explanation can there be for its sucking up those dividends which were not in fact earned in that year? If that was its purpose, it could have accomplished it so simply and without the need of any lawsuit. It could have simply erased any dividends in that year.

And to me, in that connection, it was of some cogency that Mr. Prince testified on pages 421 and 422 of the record that it was always his policy to suck money up into the Maine Company, and indeed it was his policy.

On the chalk that is before Your Honors for the years 1922 through 1933 (See this record p. 22), if you will examine it, you will find, I think, that in seven years out of the group more was sucked up than was actually earned, and in only five years was less sucked up than was actually earned.

How can it be said that the purpose of this corporation had now changed, that it was no longer an honest business concern plowing the straight furrow I have pointed out? How can it now be said it had merely become a creature, a device used to escape surtaxes? Its conduct simply is not consistent with that suggestion.

Before I close, just one more thing. When I was last in this court room, I learned to my delight that there is no difference now between the minority and the majority on this one fundamental point. Both the minority and the majority believe that the actual purpose for which this petitioner accumulated its funds was that of liquidating the Jersey Company in 1940. When I discovered that, I will say frankly that I thought then it meant the end of this case. I firmly believe the law to be that any purpose honestly held and adhered to, and motivating the conduct of a corporation for over a quarter of a century, makes 104 just as inapplicable as if it were written in Chinese. Further study, though, convinced me that there are at least some Members of this Board who insist that the actual purpose must be a purpose within the reasonable needs of the corporation which so accumulates; and those Members, as I understand

them, believe that the reasonable need must exceed in degree and force those needs by which ordinary businessmen govern their conduct.

Those Members, it seems to me, require that the necessity for the accumulation must be actually a legal necessity. But even that necessity I trust my argument today has now supplied. I am convinced that if those Members to whom I now address my remarks will study the so-called by-pass agreement, Exhibit S-46, and if those Members will read the cases I have referred to, they will reach the conclusion that the Maine Company had no choice in the matter. It was legally forced to protect the Jersey creditors, and protect the Jersey stockholders. And as the years went by and it stripped the Jersey Company and the operating companies of all the funds with which they could hope to meet their own debts, a certain and a compelling duty devolved upon the Maine Company to protect those companies, and a charge on every dollar taken from them was legally fastened on those funds in the Maine Company's treasury. And in the end when the liquidation of the Jersey Company came, as appears in the affidavit of Mr. McDonough filed with this Board, let it be said the Maine Company performed that legal duty with meticulous care.

This case, may it please Your Honors, is now in this position: The actual purpose, the real purpose for which the Maine Company accumulated its funds, is recognized and admitted by everyone, minority and majority alike, to have been the purpose of liquidating the Jersey Company.* That

* Reference is made to the Record of the hearing on July 18, 1940, p. 88:—
"Member Smith: I might state at this point that I never had any doubt from the testimony in this case, that Mr. Prince and the others in authority here had an expectation all during the years 1920 to 1933 inclusive, to liquidate the Jersey Company. I think that the testimony warrants that,

admission seems to me decisive of this case but for such Members of the Board as feel that that purpose must be authenticated, so to speak, by a legal duty to accumulate, my argument if carefully and, may I say, sympathetically considered, will, I think, supply that authentication. And I therefore urge, and urge in the conviction that I am wholly right, that the last three findings of the Board be stricken; that the findings as suggested by me be substituted and be made the majority findings of the Board.

Member Smith: Mr. Welch, do I understand that your remarks on this motion that we are considering cover also the "Motion for Further Hearing?"

Mr. Welch: They have to, because I have been forced to argue the case as a whole on the last three points.

Mr. Clark: I have nothing to add, Your Honor, unless it is possible Mr. Pierson may have something to say relative to the figures Mr. Green referred to. I don't know whether he has or not. I haven't gone into that phase of the case.

Mr. Pierson: In that connection, if Your Honors please, I think in choosing, in taking one year as an example where the dividends are paid in excess of the earnings, there again it does not give the clear picture. You have also, in the last column, with respect to the Transit Com-

bet was not the basis of any conclusion that I reached. If any member of the Board reached a contrary conclusion from any statement made in the opinion, why it should be corrected, of course."

and again at p. 89:—

"Member Smith: I could not find from the record any evidence that the Maine Corporation had any purpose except the purpose of Prince, and the company could not have, the corporation can't have a purpose except the purpose of its officers or directors, and I have no doubt that Prince had the idea. I think it was plain all through this testimony, that it was his idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares to pay off not only all of the bonds of the Jersey Company in or before 1940 but all of the indebtedness of all of the other corporations."

pany, the Produce Terminal Company and Railway Company, and other companies stated at pages 16 and 17 (41 B.T.A. 605, 606) of the opinion, included the earned surplus, which shows a large accumulation of earnings in these years, especially one of which being in the year 1932 immediately preceding; in that year there was an accumulation of net income in the Transit Company of $3,617,984.99, of which only $1,843,372.44 were distributed. That is, in choosing one particular year to show that a dividend was paid in excess of the earnings for that year, to me it indicates no particular point unless we look at the picture of all the years and see how much the corporations have accumulated in their surplus during the years and how much they have in the surplus to distribute as dividends.

Member Smith: That concludes the hearing?

Mr. Welch: May I say that it is my intention, as on the last hearing, to have the record printed and distributed to all Members of the Board.

Member Smith: Very well.

(Whereupon, at 4:30 p. m., the hearing of the above-entitled matter was concluded.)

[Title omitted.]

ORDER.

[Dated January 25, 1941.]

The petitioner filed the following motions relative to the Board's findings of fact and opinion in the above-entitled proceeding published at 41 B. T. A. 590: "Motion to Modify Findings of Fact and for Additional Findings of Fact" and "Motion for Further Hearing." Oral argument was heard thereon before a Division of the Board consisting of Members Kern, Opper, and Smith. Due consideration having been given thereto, it is ordered that the Board's findings of fact be supplemented as follows:

Add to finding numbered 34 the following:

"All of the securities sold by F. H. Prince & Co. to the petitioner in 1930, 1932, and 1933 were marketable securities and were sold to the petitioner at market price."

Add to the findings of fact the following:

"47. During the years 1922 to 1933, inclusive, the petitioner withdrew from the Jersey Co. and its subsidiaries in dividends more than the net earnings of the Jersey Co. and its subsidiaries for that period available for distribution to the petitioner."

"48. The signed stipulation of facts, together with exhibits S-1 to S-69, inclusive, attached thereto, are made a part of our findings."

and that the motions be otherwise denied.

Reviewed by the Board.

(Signed) CHARLES P. SMITH, *Member.*

[SEAL.]

STERNHAGEN, VAN FOSSAN, MURDOCK, LEECH, and KERN dissent.

[Title omitted.]

ORDER.

[Dated February 11, 1941.]

Under date of January 25, 1941, the Board entered an order in the above-entitled proceeding modifying its findings of fact as therein indicated.

Under date of April 5, 1940, the respondent filed his computation for entry of decision based upon the Board's report promulgated March 20, 1940. It is ordered that the parties file recomputations of deficiencies for the years 1930, 1932, and 1933, if such are necessary, in accordance with the Board's report promulgated March 20, 1940, as amended by its order entered January 25, 1941, on or before March 12, 1941, at which time hearing will be had thereon.

(Signed) CHARLES P. SMITH, *Member*

[SEAL.]

[Title omitted.]

MOTION FOR SPECIAL RULE.

[Filed March 1, 1941.]

Now comes the petitioner and moves that the Board, either prior to or as a part of its decision on computation under Rule 50, issue a rule as follows:

The Board's findings of facts and opinion, as amended, having held petitioner liable for the tax imposed by section 104 of the revenue acts of 1928 and 1932 for the years 1930, 1932 and 1933; it is held:

(a) Such tax for the years 1930, 1932 and 1933 be-

came liabilities of petitioner as at the close of each of the respective taxable years; as to which and upon non-payment, interest at 6% per annum became also a liability of petitioner; and

(b) The record in this case already showing that the books and income tax returns were on the accrual basis, liability for such interest upon said unpaid taxes was properly accruable at the close of each year following the year involved, as a deduction from gross income under section 23(b) in determining net income under section 21 and section 104(c).

REASONS FOR MOTION.

The Board's final report as amended were subsequent to rehearing held October 1, 1940. Subsequent thereto, *to wit*, on December 18, 1940, the Board promulgated its decision in *Floyd's, Inc.*, 43 B. T. A. No. 16, docket No. 99,562, and the Commissioner within the past few days, as petitioner is informed and verily believes, has acquiesced therein. This decision holds that the section 104 tax for the year 1930 was ascertainable at the close of the year involved, that provision therefor was properly made in years prior to that of final determination by litigation; that termination of litigation does not create the liability; and that, all of the facts necessary to determine section 104 liability having been ascertainable at the close of the year involved, the tax was at that time a liability for debt.

Petitioner now for the first time faces the situation where it may be ruled, here or elsewhere, that *Floyd's, Inc.*, either invalidates or otherwise highly questions G. C. M. 9575 (X-1 C. B. 381) and, should the Board be affirmed on review, its rights to such accruals prejudiced on the ground of separate issue not timely raised before the Board. To forfend against such contingency or revocation or alteration,

it is asked that the Board on the record as it stands, make the ruling in advance of its order under Rule 50.

Respectfully submitted,

WARREN W. GRIMES,
Shoreham Building,
Washington, D. C.,
Of Counsel for Petitioner.

[Title omitted.]

PETITIONER'S COMPUTATION FOR ENTRY OF DECISION.

[Filed March 6, 1941.]

The attached proposed computation is submitted, on behalf of the Petitioner, to the United States Board of Tax Appeals, in compliance with its Opinion determining the issues in this proceeding.

This computation is submitted in accordance with the Opinion of the Board, without prejudice to the Petitioner's right to contest the correctness of the decision entered herein by the Board, pursuant to the statutes in such cases made and provided.

JOSEPH K. MOYER,
1343 H St., N. W.
Washington, D. C.

WARREN W. GRIMES,
Shoreham Building,
Washington, D. C.
Of Counsel for Petitioner.

STATEMENT.

Petitioner's Recomputation

In re: Chicago Stock Yards Company,
B. T. A. Docket No. 83797.

INCOME TAX LIABILITY

Years	Tax Liability	Tax Assessed	Deficiency
1930	$1,910,467.38	$ 92,781.28	$1,817,686.10
1932	1,095,285.40	13,496.47	1,081,788.93
1933	1,066,789.38	12,963.21	1,053,711.41
Total	$4,072,542.16	$119,240.96	$3,953,186.44

Year Ended December 31, 1930.

Schedule 1 Adjustments to Net Income.

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)		$1,286,536.44
Net income as determined under Board of Tax Appeals decision promulgated March 20, 1940 (Section 21)		$1,286,536.44
Net income, deficiency notice (Section 104 (c))		3,512,166.03
Net income, Board of Tax Appeals decision (Section 104(c))		$3,512,166.03

Explanations of Changes.

The United States Board of Tax Appeals in a decision promulgated March 20, 1940, sustained the Commissioner for the year 1930.

Schedule 2 Computation of Tax.

Net income, Schedule 1 (Section 21)	$1,286,536.44	
Tax at 12% (Section 13)		$ 154,384.37
Net income, Schedule 1 (Section 104 (c))	$3,512,166.03	
Tax at 50% (Section 104(c))		1,756,083.01
Total tax liability		$1,910,467.38
Total previously assessed:		
Account #401545		92,781.28
Deficiency		$1,817,686.10

Year Ended December 31, 1932.

Schedule 3 Adjustments to Net Income.

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)		$ 310,679.56
Net loss as redetermined under Rule 50 of the U. S. Board of Tax Appeals, as a result of its decision promulgated March 20, 1940 (Section 21)		(43,583.64)
Net adjustment as computed below		$ 354,263.20
Net income, deficiency notice (Section 104(c))		$2,544,834.00
Net income, as redetermined under Rule 50 of the U. S. Board of Tax Appeals, as a result of its decision promulgated March 20, 1940 (Section 104(c))		2,190,570.80
Net adjustment as computed below		$ 354,263.20
Nontaxable income and additional deductions:		
(a) Loss on sale of stock	$221,202.03	
(b) Assessment on shares of stock	24,000.00	
(c) Interest accrued on 1930 deficiency tax (Schedule 2 hereinabove) of $1,817,086.10 for the year 1932	109,061.17	
Net adjustment as above	$354,263.20	

Explanation of Items.

(a) In accordance with a stipulation filed with the United States Board of Tax Appeals the petitioner is entitled to deduct a loss of $221,202.03 in 1932 on the sale of 3,050 shares of the Stock Yards National Bank and 240 shares of the Central Manufacturing District Bank to F. H. Prince and Company, Incorporated.

(b) It is stipulated that the petitioner is entitled for 1932 to a deduction not claimed on its return of $24,000.00 paid as an assessment made by the banking authorities of the

State of Illinois against 240 shares of the Central Manufacturing District Bank owned by the petitioner.

(c) The taxpayer's books of account are kept on the accrual basis, its income tax return was filed on that basis and its income tax liability was computed in accordance therewith. The Board of Tax Appeals' decision of March 20, 1940, and Orders of September 21, 1940 and January 25, 1941, redetermine the deficiency for the calendar year 1930 in the amount of $1,817,686.10. On the basis of the Board's redetermination, the deficiency tax became a liability on December 31, 1930, due and payable on March 15, 1931, from which latter date interest at the rate of 6% accrued.

Therefore, on December 31, 1932, interest had accrued on the deficiency of $1,817,686.10 for the year 1932 in the amount of $109,061.17, which is an allowable deduction from gross income (Section 23 (b) of the Internal Revenue Code) in redetermining the net income under Section 21 and Section 104 (c).

Schedule 4 Computation of Tax.

Net loss, Schedule 3 (Section 21)		$43,583.64
Tax at 13¾% (Section 13)		None
Net income, Schedule 3 (Section 104(c))	$2,190,570.80	
Tax at 50% (Section 104(c))		$1,095,285.40
Total tax liability		$1,095,285.40
Total previously assessed, Account #401883		13,496.47
Deficiency		$1,081,788.93

Year Ended December 31, 1933.

Schedule 5 Adjustments to Net Income.

Net income as disclosed by deficiency letter dated January 27, 1936 (Section 21)	$95,324.01

Net loss as redetermined under Rule 50 of the U. S. Board of Tax Appeals, as a result of its decision promulgated March 20, 1940 (Section 21)		(65,262.91)
Net adjustment as computed below		$ 160,586.92
Net income, deficiency notice (Section 104(c))		$2,293,936.16
Net income, as redetermined under Rule 50 of the U. S. Board of Tax Appeals, as a result of its decision promulgated March 20, 1940 (Section 104(c))		2,133,349.24
Net adjustment as computed below		$ 160,586.92
Nontaxable income and additional adjustments:		
(a) Interest accrued on deficiency tax (Schedule 2 hereinabove) of $1,817,686.10 for 1930, for the year 1933 at 6% per annum: $1,817,686.10 @ 6%	$ 109,061.17	
(b) Interest accrued on deficiency tax (Schedule 4 hereinabove) for 1932 of $1,081,788.93 for the period March 15, 1933 to December 31, 1933 ($1,081,788.93 for nine months, 16 days @ 6%)	51,525.75	
Net adjustment as above		$ 160,586.92

Explanation of Items.

(a) The taxpayer's books of account are kept on the accrual basis; its income tax return was filed on that basis and its income tax liability was computed in accordance therewith. The Board of Tax Appeals' decision of March 20, 1940, and Orders of September 21, 1940, and January 25, 1941, redetermine the deficiency for the calendar year in the amount of $1,817,686.10. On the basis of the Board's redetermination, the deficiency tax for 1930 became a liabil-

ity on December 31, 1930. Since such deficiency accordingly became due and payable on March 15, 1931, and was not thereupon paid, interest accrued thereon at the rate of 6% per annum amounting to $109,061.17 for the calendar year 1933.

(b) The recomputed deficiency for the year 1932 is $1,081,788.93 (Schedule 4 hereinabove) which became a liability on December 31, 1932, on which interest accrued in 1933 from March 15, 1933, to December 31, 1933, at 6% per annum. The interest for nine months, sixteen days amounts to $51,525.75, which is an allowable deduction from gross income in arriving at the net income under Section 21 and Section 104(c).

Schedule 6 Computation of Tax.

Net loss, Schedule 5 (Section 21)	($65,262.91)	
Tax at 13¾% (Section 13)		None
Net income, Schedule 5 (Section 104(c))	$2,133,349.24	
Tax at 50% (Section 104(c))		$1,066,674.62
Total tax liability		$1,066,674.62
Tax previously assessed: Account #401650		12,963.21
Deficiency		$1,053,711.41

[Title omitted.]

ORDER.

[Dated March 7, 1941.]

On March 1, 1941, the petitioner filed with this Board a "Motion for Special Rule." The motion reads in material part as follows:

> "Now comes the petitioner and moves that the Board, either prior to or as a part of its decision on computation under Rule 50, issue a rule as follows:
>
> The Board's findings of facts and opinion, as amended, having held petitioner liable for the tax imposed by section 104 of the revenue acts of 1928 and 1932 for the years 1930, 1932 and 1933; it is held:
>
> (a) Such tax for the years 1930, 1932 and 1933 became liabilities of petitioner as at the close of each of the respective taxable years; as to which and upon non-payment, interest at 6% per annum became also a liability of petitioner; and
>
> (b) The record in this case already showing that the books and income tax returns were on the accrual basis, liability for such interest upon said unpaid taxes was properly accruable at the close of each year following the year involved, as a deduction from gross income under section 23(b) in determining net income under section 21 and section 104(c)."

On March 4, 1941, petitioner filed with this Board a "Motion for Ruling Preliminary to Rule 50 Computation" which reads in material part as follows:

> "Now comes the petitioner and moves that the Board, on its findings of facts already made, rule that in computing net income under sections 23(b), 21 and 104(c),

the *petitioner and respective subsidiaries accrue*, as properly set aside in reserves and in the years already found, the amounts loaned or advanced for the relief of banks related to the enterprise and covered in Finding numbered 23 as follows:

1930		
Transit Company	$ 464,000.00	
Transit Company	100,000.00	$ 564,000.00
1932		
Petitioner	$ 327,307.55	
Petitioner	3,071,779.19	
Transit Company	1,340,000.00	
Produce Terminal	350,000.00	$5,089,086.74
1933		
Petitioner	$1,800,000.00	
Transit Company	1,016,414.84	
Transit Company	1,300,000.00	
Produce Terminal	300,000.00	
District	600,000.00	$5,016,414.84

and that these extraordinary, emergency, and unanticipated expenditures were outside the program of accumulating profits to provide for the 1940 liquidation of the Jersey Company." [Italics ours.]

This proceeding is before the Board for a recomputation of deficiencies for the years 1930, 1932, and 1933. New issues may not be injected into the case for the purpose of a recomputation under Rule 50 of the Board's Rules of Practice. See *Bankers' Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308. Accordingly, it is ordered that the motions of the petitioner be and the same are hereby denied.

CHARLES P. SMITH, *Member.*

[SEAL.]

[Title omitted.]

REPORTER'S MINUTES.

[Filed March 19, 1941.]

Hearing at Hearing Room No. 3, Internal Revenue Building, Washington, D. C., on Wednesday, the 12th day of March, 1941, at 10:45 o'clock A. M.

The above-entitled proceeding came on for hearing on this the 12th day of March, 1941, before the HONORABLE CHARLES P. SMITH, Member of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had, to-wit:

Appearances:

Warren W. Grimes, Esq. (Shoreham Building, Washington, D. C.),

Francis B. Keeney, Esq. (1310 Turks Head Bldg., Providence, Rhode Island),

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Joseph K. Moyer, Esq. (1343 H Street, N. W., Washington, D. C.),

J. Bond Smith, Esq. (Woodward Building, Washington, D. C.),

Appearing on behalf of Petitioner.

R. H. Transue, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

PROCEEDINGS.

The Clerk: Docket No. 83,797, Chicago Stock Yards Co. Please state your appearances for the record.

Mr. Grimes: Warren W. Grimes for petitioner.
Mr. Transue: R. H. Transue for respondent.
The Member: Mr. Grimes, you may proceed.

STATEMENT ON BEHALF OF THE PETITIONER.

Mr. Grimes: If Your Honor please, we are before the Board this morning in what normally is the last round of what has been undoubtedly a very protracted and difficult case.

Petitioner would like to direct attention to items of difference between the computations filed, respectively, by the respondent and the petitioner, but only on the basis of the Board's Findings, independent of any motions that have been filed or any action that has been taken on those motions.

These differences affect only the years 1932 and 1933, so that on the first year, 1930, there is no contest.

I would like to cover, in their order, the following points:

(1) That the Board must make a correct computation under the statutes;

(2) That any item covered by the Findings and not calling for additional evidence or argument, is includable properly in the recomputation;

(3) That the Board's Findings show that the accrual system was used;

(4) That the liability claimed herein is properly accruable;

(5) That there is no distinction in accounting between the tax involved and the interest on the tax unpaid;

(6) That it is the Board's duty to include the item of accrual of interest on unpaid tax; and finally,

(7) The subject of losses for 1932 and 1933 because of the bank situation.

The first item in the petitioner's computation, appearing on page 3 as Item (c), is as follows:

"The taxpayer's books of accounts are kept on the accrual basis, its income tax return was filed on that basis and its income tax liability was computed in accordance therewith. The Board of Tax Appeals' decision of March 20, 1940, and Orders of September 21, 1940 and January 25, 1941, redetermine the deficiency for the calendar year 1930 in the amount of $1,817,686.10. On the basis of the Board's redetermination, the deficiency tax became a liability on December 31, 1930, due and payable on March 15, 1931, from which latter date interest at the rate of 6 percent accrued.

"Therefore, on December 31, 1932, interest had accrued on the deficiency of $1,817,686.10, for the year 1932 in the amount of $109,061.17, which is an allowable deduction from gross income (Section 23(b) of the Internal Revenue Code) in redetermining the net income under Section 21 and Section 104(c)."

As to the year 1933, the same principle as to the year 1930 deficiency, plus:

"The recomputed deficiency for the year 1932 is $1,081,788.93 (Schedule 4 herein) which became a liability on December 31, 1932, on which interest accrued in 1933 from March 15, 1933 to December 31, 1933 at 6 percent per annum. The interest for nine months, sixteen days, amounts to $51,525.75, which is an allowable deduction from gross income in arriving at the net income under Section 21 and Section 104(c)."

For the years 1932 and 1933, Your Honor will remember that there are statutory net losses. Obviously that would

not affect the question of normal corporation tax, and just as obviously it will affect the question of Section 104 tax.

The Board's Findings show that the accrual basis was used. Attention is called to Finding 25 on page 13—that is, in the pamphlet form—Finding 27 on pages 13 and 14, and Finding 48, which is the blanket finding including as the Board's Findings all of the stipulation exhibits; particular attention being called to page 6 of Exhibit S-52.

Under the statutes, and under Rule 50 itself, the Board is given the duty of finding the correct deficiency, and of making a correct computation, using as the basis, admittedly, the findings and the opinion. In his duty the Board is governed specifically by certain statutes as to computations. Sections 41 and 43 of the Acts involved direct that computation of net income shall be made on the basis used in the books and the returns; and that deductions and credits shall be taken in the year "paid or accrued" or "paid or incurred"—I call Your Honor's particular attention to the use of the term "incurred"—according to the accounting method used.

The Regulations (Article 322 of Regulations 74) require that consistency as to income and deductions must be exercised.

No computation can properly be made of a deficiency under Section 104 unless there first is determined the net income under Section 21. Both of the computations now filed—that is, those filed by the Government as well as those filed by the petitioner—show items that were stipulated or have been found by the Board as deductions under Section 23, which section is the starting point, logically, for any computation under Section 104.

The interest accrual item claimed arises only out of the Board's findings, but the justification of the deduction and the exact amount thereof are ascertainable from the same

finding, without any further hearing, without any further evidence, and without any search by the Board, and under the plain duty of the Board to correctly, justly, and fairly deal with the parties while they are still before it, the petitioner here presents the item as a proper item in a recomputation proceeding.

I should like to refer to certain cases. First the case of *Bankers Pocahontas Coal*, 287 U. S. 308. I cannot see that this decision has any applicability to this case. Your Honor heard that case below. The issues there were, first, whether royalties were taxable income; and second, whether the depletion allowance adopted in a prior District Court suit was *res adjudicata*. After the Board's findings and opinion, and on the Rule 50 computation, the taxpayer for the first time made a claim that would have required additional evidence, and in fact tendered that evidence to support the claim, the tender being made during the recomputation proceedings. The Board rejected the evidence, and the Courts affirmed its action. A rehearing was really what was asked there, on a clearly new issue and one that easily could have been raised when the proceedings first started.

Compare this with our claim, which calls for no new evidence, but rests upon the Board's findings. We claim we are nearer the *Strother* case, which Your Honor will remember went to the Circuit Court of Appeals with the *Bankers Pocahontas* case, the *Bankers Pocahontas* case going to the Supreme Court, and the *Strother* case being remanded to take additional testimony, the Court holding that such a course was "just."

The present case, we feel, is much nearer the *Edison Securities* case, 78 Fed. (2d) 85, before the Circuit Court of Appeals for the Fourth Circuit. There, as the direct result of the Board's findings and opinion, a question arose for the first time as to the amount of the deficiency. After

the taxpayer had filed its Rule 50 computation, the Commissioner filed a motion claiming an increased deficiency. The Board denied the motion on the ground that such a claim must be asserted at or before hearing or rehearing, and that this stage had been passed when the motion was filed. The Circuit Court of Appeals held the claim could have been made even during the Rule 50 hearing, that the Board might well have acted upon its own motion, and that:

> "It cannot be doubted, in view of the purpose for which the Board was established and of the statute governing its procedure, that it has equal power to do full justice to the parties while they are still before it."

That case was remanded for further proceedings.

There the matter arose only after the Board's opinion. The Board's findings gave rise to it. Nevertheless, it cannot be doubted that it was susceptible of being raised as an issue from the start, and that additional evidence was required to support it.

So with our case. This item as to the accrual of interest arises as a matter of computation only because of the Board's findings. It could not have been raised properly as a separate issue at the time the petition was filed. Issues are framed in pleadings before this Board, in other than fraud cases, by asserting some such form as:

> "The Commissioner erred in doing thus and so, or in refusing or failing to do thus and so."

The only way we could have raised this point as an issue was to have alleged that the Commissioner erred in failing to allow us as a deduction under Section 23 the amount properly accruable due to an unpaid liability under Section 104, which liability itself we are denying and contesting as the main issue in this case before the Board. We would be

setting up and claiming a liability on one hand directly inconsistent with our major issue in the case.

In *Commissioner* v. *Sussman*, 102 Fed. (2d) 919, the issue was whether a certain transfer constituted a reorganization under the statutes. The issue as to valuation of the stock which changed hands during that transaction was attempted to be raised for the first time in the computation proceedings. The attempt was denied on the ground that it was a new issue, and the Circuit Court of Appeals for the Second Circuit affirmed the denial. The *Sussman* case refers to certain instances in which the Board is charged with having abused its discretion, particularly the *Edison Securities* case and the *Ray* case, 88 Fed. (2d) 891. It includes instances where the Board denied motions where evidence relied upon was not available before the Board's findings.

Hughes v. *Commissioner*, 104 Fed. (2d) 144, shows on its face that additional evidence would have been needed.

The *Ray* case, which has been referred to and which was before the Seventh Circuit, shows that the Board ruled income was received in 1928 rather than 1926, the issue being the year in which alleged income had been received. After the Board's findings, the Commissioner moved for an increase in the 1928 deficiency claimed, and the Board ruled that the motion was untimely. The Circuit Court of Appeals for the Seventh Circuit said:

> "There is no reason why the Board should not be as liberal in allowing amendments to claims as courts are in allowing amendments to pleadings. * * * The Commissioner was within the time thus fixed. * * * The hearing is not completed until these computations are made and approved by the Board."

That was the case in which the taxpayer claimed that a certain amount received was a gift, and the Government

claimed it was compensation for 1926 for services rendered. Remember the year; the Government was contending it was compensation for 1926. The Board ruled, although the Commissioner had not claimed it, that it was income for 1928, and the Circuit Court of Appeals said:

> "After the Board's decision, its inclusion in the 1928 income was a matter of computation under the Rules. It was not a new claim although allowed by the Board as part of the income for a year other than that claimed by the Commissioner."

That case was remanded to the Board to so proceed. The common sense of this is that because the findings fairly covered the item, it should be recognized in the computation proceeding.

In the case of *Richardson*, 39 B. T. A. 927, at page 936, it is said:

> "It is the duty of this Board to determine the correct deficiency in tax and do full justice to the parties."

citing *Edison Securities*. In that case the Board disallowed a 1934 deduction, because it already had granted that deduction for 1932, even though the Commissioner had not urged the 1934 disallowance.

I cite these cases to show where the Board, in its discretion and in its duty to do justice and exercise fairness, has gone beyond the claims of the parties even on the records.

Is this interest item accruable? If, at the close of the year, a debt is due, no one can seriously question that the accrual system demands that it be accrued. Certainly, if the debt has been incurred it must be accounted for.

The Section 104 tax not having been paid on the due date, interest at 6 percent thereon became as much and as

fully a debt as the tax itself, collectible at the same time and by the same machinery as the tax itself. It is impossible to intelligently distinguish between these two items as debts, and a debt, under the accrual system, must be accrued.

When did both of them become debts? The leading case, of course is *U. S.* v. *Anderson et al*, 269 U. S. 422, which, as Your Honor will remember, involved the question as to the proper year for deduction by way of accrual of munitions taxes during the year 1916, the taxes being payable in 1917, which latter year is the year the taxpayer claimed them as properly accruable and as deductible. The Commissioner contended they were accruable at the end of 1916, and in sustaining him the Supreme Court said:

> "In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. * * * In the economic and bookkeeping sense * * * the taxes had accrued."

I ask Your Honor to keep in mind our claim as to the absence of any distinction between the tax and the liability for interest on the unpaid tax as being debts and therefore equally accruable, wherever these cases refer to the tax liability.

Following the quotation just read from the *Anderson* case, it was so held in *Brooklyn Union Gas*, 22 B. T. A. 507, although the point as to liability for the tax still was in litigation. So it was in *Bartles-Scott Oil Co.*, 2 B. T. A. 16, though litigation already had started as to the validity of the assessment. So it was in *Uncasville Manufacturing Co.* 55 Fed. (2d) 893, the language of which I ask Your Honor

to consider in dealing with this interest as of December 31st, following the due date when the tax was unpaid:

"All the facts upon which calculation—"

(I accent "calculation")—

"depended had been fixed before the expiration of the year. * * * The computation was uncertain, but its basis was unchangeable; it was unknown, not unknowable, on December 31."

So it was in *Hoverty*, 20 B. T. A. 644.

The Member: What was the name of that case?

Mr. Grimes: *Hoverty*, H-o-v-e-r-t-y, 20 B. T. A. 644, holding that additional assessments of tax accrue at the time they would have accrued upon a correct original assessment.

So it was all the way back to *A.R.R.* 1153, I-2 C.B. 92. See also *I. T. 2500*, VIII-2 C.B. 103; and *I. T. 2972*, XV-1 C.B. 108.

So also it was in *U. S. v. Woodward*, 256 U. S. 632. So it was in *Continental Baking Co.*, 77 Fed. (2d) 119, from which the following is taken from the decision of the Circuit Court of Appeals of the District of Columbia, and I again ask Your Honor to keep in mind its applicability to the debt for interest as well as debt for tax:

"The amount and basis of the tax was fixed and easily ascertainable in the years involved. No element of contingency was involved.

"We think, therefore, that in cases of this character the status of the corporation during the taxable period which established the liability for the tax should control. The finding was based upon facts existing in 1925 which brought the case within the provisions of the act and regulations. It was then that the capital

stock tax accrued and the liability for the tax was dependent upon the question of fact as to whether the corporation was engaged in business during the taxable period."

And I am accenting this from the decision:

"These conditions were all present and complete in the year in issue and could have been determined by the Commissioner as readily at that time as in later years. Nothing occurred during the intervening period affecting the determination. All the facts existed which fixed the liability and determined the amount of tax in the year involved when the tax must be held to have accrued." *Brown*, 8 B. T. A. 112, which was acquiesced in.

"The word 'accrue,' under the accrual system, does not mean that the item is due in the sense of being then payable. The accrual system wholly disregards due dates. Neither need the amount of an incurred liability be accurately ascertained in order to accrue it."

To the same effect, see *McGuire* v. *Commissioner*, 74 Fed. (2d) 729, Circuit Court of Appeals for the Second Circuit, certiorari denied.

We come then to *Floyd, Inc.*, 43 B. T. A. No. 16, Docket No. 99562, which unequivocally holds that regardless of the fact of litigation as yet unsettled in 1934, the tax under Section 104 for the year 1930, not determined until 1935, was a debt liability on December 31, 1930.

You cannot distinguish our present case from the *Floyd* case by saying that the latter arose under Section 351. The only way you can attempt to distinguish it is to attempt to distinguish between different kinds of debts for purposes of accrual. You cannot hold that interest on an unpaid tax imposed by the law at a definite rate from a fixed date is any

less an indebtedness than the tax itself. You cannot say that liability for this interest was any more conjectural, uncertain, or unsettled than liability for the tax itself. The incidence of the one equals precisely the incidence of the other.

This Board said in the *Floyd* case:

> "We are of the opinion that the Board's decision of October 9, 1935, did not as of that date create a liability or indebtedness of petitioner for income tax for the year 1930 and 1931; for the factual circumstances existing in 1930 and 1931 and the then applicable statute had already fixed petitioner's liability for those years."

I should like to insert there that the same thing as to the statute fixing liability applies to interest on unpaid taxes.

> "The deficiency notice proposed the assessment of additional taxes in a certain amount and the Board's decision redetermined the amount by applying the law to the facts as established by events which had occurred in each of the years 1930 and 1931. The petitioner's correct tax liability, as imposed by law, was ascertainable at the close of each of the years 1930 and 1931, and the controversy between the petitioner and the Commissioner as to the amount thereof"—

meaning whether Section 104 applied—

> "did not serve to postpone the time when the liability, if any, became fixed, or to cause the liability to remain contingent upon future settlement of the controversy."

The decision then says:

> "It is also settled that a liability incurred for Federal taxes constitutes a debt to the United States."

citing *Billings* v. *U. S.*, 232 U. S. 261.

On this point, as to the correct liability being immediately ascertainable by the Commissioner, I call Your Honor's attention to the fact that this Section 104 imposes upon the stockholders of the corporation the necessity of making an immediate determination, because the only "out"—to use a popular term—is Section 104(d), and if those stockholders intend to preclude the application of Section 104 to their corporation, they have to determine by the 15th of the following March whether there was any liability on the facts as they existed during the prior year.

Reverting, then, to the last part of the quotation from the Board's decision in the *Floyd* case as to its being well settled, as we all know, that a liability incurred in Federal taxes constitutes a debt to the United States, we find that under Section 292 of the Acts involved, interest upon deficiencies is so much the same debt as the tax itself that it is required to be assessed and collected at the same time and in the same manner as the deficiency, at 6 per cent from the date prescribed for the payment of the tax. How, therefore, can it be considered any the less an indebtedness, since it is specifically imposed by the statute?

If it is an indebtedness, it must have been accrued as such under the accrual system, and it certainly must be recognized as having been incurred by the end of the year following the year in which the tax was supposed to have been paid.

The solitary citation generally relied upon in opposition to our contention is *G.C.M. 9575*, X-1 C.B. 381. It rests largely, if not entirely, upon *Lucas* v. *American Code*, 280 U. S. 445, which case, however, involved litigation over an alleged breach of contract—purely a contingency. There is no analogy between that case and cases involving taxes, and the Supreme Court so states in the opinion in *Lucas* v. *American Code*. Not only that, but the *G.C.M.* includes the

motation from the Supreme Court's decision that it is entirely different from the situation in the *Anderson* case. The *G.C.M.* concludes that "as long as the indebtedness is denied and the liability to pay taxes is contested before the Bureau, the Board of Tax Appeals, or the courts, the taxpayer should not be permitted or required to accrue interest upon the disputed indebtedness (deficiency)"—and pay particular attention to this—"unless a different rule applies in the case of taxes than applies in the case of other accruable items."

It admits on its face that the Supreme Court has not indicated that its decision in the *Anderson* case is limited to the accrual of taxes alone, and it cites certain cases in which the *Anderson* case has been used to support the accrual of other accruable items.

G.C.M. rests its conclusion on the fact that the amount of interest might not be ascertainable. That certainly is upset by the cases which I have cited. That has nothing to do with the accruability of taxes. The alleged practical difficulties suggested by the *G.C.M.* as to the years that have been closed are of no importance, particularly where, as in this case, all the years which are asked for still are open.

The rule I am contending for would work both ways, and certainly the Government would not hesitate to claim that a deduction was allowable only in a year which it knew had been closed. Citations for that are not necessary, since they would fill volumes.

G.C.M. 9575, I say, has been definitely overruled by the Board and the courts in the decisions which I have cited. If Your Honor should feel otherwise, I call your attention to the fact that as a *G.M.C.* it could be revoked tomorrow, and this petitioner would have no assurance whatever that in the year or for the year in which the

present litigation finally terminates, it may find itself faced with a change by the Government for so-called "practical" reasons, or for what I would call "fiscal expedience."

Concluding, therefore, as to this item, the petitioner's position is that from the Board's findings in this case, the taxpayer was on the accrual basis; it is held liable under Section 104 for 1930, 1932 and 1933; the decisions are that this liability was an indebtedness at the close of each of those years; the due date was March 15th following each year, and on failure to pay on that date, liability for the statutory interest thereon was an indebtedness as fully as liability for the tax; that being an indebtedness on the following December 31st, it was accruable and therefore should be recognized in this computation as deductible in computing net income under Section 23(b), Section 21, and Section 104.

The Member: Do I understand that the interest that you are contending for accrued during the years 1932 and 1933 upon the deficiency for 1930 is the amount of interest which the taxpayer would have to pay if the decision of the Board for 1930 is sustained?

Mr. Grimes: I would say, which the petitioner was liable for under the decisions on December 31 of each one of the years following the due date.

The Member: Take the deficiency for 1930. The deduction you are claiming for 1932 is the interest at 6 percent for one year upon that deficiency for 1930; is that correct?

Mr. Grimes: That is correct. And for the year 1933 we include that interest for one year plus interest on the 1932 deficiency under Section 104 from March 15, 1933 to December 31, 1933. That, precisely, is correct.

There is one observation right here—it is an interpolation clearly—that I should like to make with regard to the accrual basis and a computation under Rule 50: That

if the Board in this case is limited exclusively to its findings in order to make this computation, and is unable properly to go back to the record independent of the specific findings as such, it could not make a computation, for instance, on such items as to whether the basis for the computation of the tax is a calendar year rather than a fiscal year. In this computation the Board must go back beyond the findings to certain of the exhibits. It cannot avoid it, for nowhere in the findings has this Board specifically held that a calendar year basis was involved. It is perfectly sensible that the Board should go back to the exhibits, to the returns, to find the basis from the calendar year standpoint, and it is just as sensible that it go back to those same things to find the basis upon which they were prepared, which show they were on the accrual basis. Independent of this, however, the findings of the Board show that the accrual basis was used.

The Member: I am in agreement with you on that point.

Mr. Grimes: You are in agreement, Your Honor?

The Member: Yes. Of course if it is necessary to go to the record, if the record shows the facts, the Board will go to the record to determine the correct deficiency.

Mr. Grimes: Then, Your Honor, I merely want to suggest this, that independent of the findings, the returns show that the accrual basis was used.

The Member: I think that is very clear.

Mr. Grimes: Is there any question Your Honor would like to ask there?

The Member: I think not. Under your theory you would say that in a case where the taxpayer is required to pay a deficiency in tax, where the taxpayer is on a cash basis the taxpayer would be entitled to deduct the interest paid on the deficiency?

Mr. Grimes. I don't see that there could be any ques-

tion if he was on a cash basis, since Section 23 says "interest paid on personal indebtedness."

The Member: It wouldn't make any difference if it were interest on a tax or not?

Mr. Grimes: No, I can't see any difference. Certainly interest on a refund would be income.

The Member: Yes, that is right.

Mr. Grimes: The second point which I raise is covered on pages 4 and 5 of what I would term the "Petitioner's Alternative Computation for Entry of Decision":

> "(d) In 1932 the petitioner purchased notes of individuals and corporations from the Central Manufacturing District Bank, paying therefor $501,439.58. These were carried in its balance sheet of December 31, 1932, at a value of $327,307.55. The petitioner loaned $3,071,779.19 to the Stock Yards National Bank and the Stock Yards Trust & Savings Bank. (Findings of Fact, 23.)
>
> "The Board's findings establish these disbursements, and at the time these disbursements were made it was known that huge losses would result. (Record pages 273-308.) By December 31, 1933, it was anticipated that the losses resulting therefrom would exceed five million dollars.
>
> "In accordance with the foregoing, the amounts, totaling $3,399,086.74, became deductions from gross income in 1932 under the provisions of Section 23 of the Revenue Act of 1932 and the Internal Revenue Code."

From page 5, as to the year 1933:

> "(b) In 1933 the petitioner agreed to subordinate $1,800,000 of its deposits in the Live Stock National Bank to the claims of other depositors. This was done

because the bank needed further assistance (Findings of Fact, 23).

"It was anticipated by December 31, 1933, that the losses resulting from assistance given by petitioner and its related companies would exceed five million dollars (Record, pp. 273-308). Accordingly, the amount of $1,800,000 became a deduction from gross income in 1933 under the provisions of Section 23 of the Revenue Act of 1932."

How are these shown by the Board's findings? Finding No. 23 gives the details as to the specific amounts, the particular companies that were involved, the years in which the advances were made or the disbursements were paid, and the underlying reasons therefor, at least in the mind of Mr. Prince. "Mr. Prince believed that it was necessary to protect these banks, etc."

Incidentally, the total amount covered by Finding No. 23 is, very roughly, eleven millions of dollars on the advancements, disbursements, that were made on account of these banks. The very striking fact is that under the computations the total amount of income of all these companies was only six millions of dollars for the same period.

Finding No. 25 covers the balance sheets of petitioner for the years 1930 to 1933, as revised to reflect the correct earned surplus. This finding shows "Advances to banks $3,071,779.19" as an asset in 1932. I call your attention that for 1933 the Board's finding is that asset had entirely disappeared, without any offset on the rest of the balance sheet.

Finding No. 48, which is the blanket finding, Exhibit S-52, page 6, also shows this fact, but very much more in detail.

Now, Your Honor, as to this item—and particularly because the Board recognizes that, in order to make a

correct computation and to do justice, it may go back to the record on which the findings are based—the petitioner feels that the Board very properly, and independent of any finding as to the existence of a purpose to evade surtaxes, should, in justice, go back if necessary and hold that these disbursements made on account of the banks—the record showing clearly that there was a loss at the end of 1933 in excess of five millions of dollars—the Board should allow in a computation of the liability the various items claimed as losses realized by the corporation under Section 23.

The Member: You predicate that claim on the testimony that it was anticipated there would eventually be a loss of five million dollars in connection with those investments?

Mr. Grimes: The record shows, somewhere between pages 273 and 308, that by December 31, 1933, it was anticipated that the total loss would exceed five millions of dollars, and that at the time of the trial it appeared that that anticipation was justified.

We ask, therefore, that both of these items be accepted by the Board as perfectly proper and timely in making its recomputation under Rule 50.

Thank Your Honor for your patience.

The Member: Mr. Transue.

STATEMENT ON BEHALF OF THE RESPONDENT.

Mr. Transue: If Your Honor please, I think the petitioner has lost sight of the nature of these proceedings. It was my understanding that this hearing came before the Board this morning under Rule 50 of the Board's Rules of Practice. Under that rule the parties have been directed to prepare computations of the deficiencies, which com-

putations were to be made pursuant to the Board's decision of March 20, 1940, as subsequently modified.

On April 5, 1940, the respondent submitted a recomputation pursuant to the Board's order of March 20, 1940. Within thirty days after March 20, the petitioner had filed three separate motions for rehearing. These motions were decided a few weeks ago, and the Board again set down the case for hearing under Rule 50, at which time the parties were directed to submit such computations as necessary to give effect to the opinion of the Board.

The modifications to the Board's decision made subsequent to March 20, 1940, do not necessitate the filing of new recomputations. The respondent relies on his recomputation filed April 5, 1940.

The petitioner, within the last few days, has filed alternative recomputations.

The question now awaiting decision is whether the respondent's computation conforms to the decision of the Board, or whether petitioner's computation conforms to the decision of the Board.

I find, upon looking at petitioner's recomputation, that it differs in three respects from respondent's. The first difference is with regard to the deduction of interest in the years 1932 and 1933. Then there is the question of deductibility of bank losses; and depending on those two questions, there is the question of the right to carry over losses from a preceding year.

On March 1, 1941, the petitioner filed a motion for special rule, which is in the nature of a motion for rehearing, requesting leave to raise a new issue. On March 4, 1941, another motion of similar tenor was filed by petitioner. Both motions were denied on March 7, 1941.

The statement has been made that it is the duty of the Board to determine the tax liability. I submit the Board

is not a review division of the Bureau. It is merely necessary for the Board to adjudicate such issues as are submitted to it under the Rules of Practice.

The decision of the Board in this case was originally promulgated March 20, 1940. These motions were filed almost 12 months thereafter. Under the Board's Rules of Practice a motion must be filed within thirty days after entry of decision or report. This is a belated attempt to raise a new issue.

I can find nothing in the Board's opinion promulgated March 20, 1940, as subsequently amended, which justifies any of the deductions asked for by petitioner in its recomputations. I submit that the recomputation submitted by respondent on April 5, 1940, correctly reflects the opinion of the Board and should be adopted by the Board for entry of its decision.

The Member: What is inconsistent with Mr. Grimes' contention here that this interest he is claiming as a deduction from gross income should be allowed?

Mr. Transue: It is contrary to respondent's position in regard to items of this nature. The respondent has indicated its position by *G.M.C. 9575*.

The Member: Of course the Board's opinion merely went to the question of whether this taxpayer was subject to the penalty tax of 50 percent on net income. I didn't pass on the net income. There were many adjustments made by stipulation to that net income. The only decision made by the Board is that the taxpayer is subject to this 50 percent addition to the tax upon that income, whatever that may be; the Board didn't determine that income.

Mr. Transue: That was agreed upon by the parties. The Board did not determine income because there was no issue necessitating such determination.

The Member: I am not clear wherein the contention

made by Mr. Grimes this morning on the interest question is contrary to the opinion of the Board. I am in every grave doubt, as to whether the taxpayer is not entitled to deduct that interest.

Mr. Transue: There is no issue before the Board requiring the determination of that issue. Respondent would have to be heard on that issue, and the Board would have to render a further decision.

The Member: If this case is on all fours with the *Floyd* case referred to by petitioner——

Mr. Transue (Interposing): The question there was whether the liability for the tax related back to a previous year; and it was likewise held in the *Continental Baking* case. However, nothing is said in either of those cases in regard to interest.

G.M.C. 9575 was promulgated ten years ago. The Commissioner has been operating under it ever since. The Commissioner says until the controversy is finally disposed of no interest on a deficiency may be accrued.

The Member: Is it your position that the total amount of interest that the petitioner may have to pay would all accrue within the year when the court determines the issue?

Mr. Transue: That is correct; whether it is 1945 or 1950 or whenever it is the controversy is disposed of, we would allow an interest deduction at that time.

The Member: And that it would not accrue year by year?

Mr. Transue: That is correct. At the present time neither one of us knows whether the Board is going to be sustained in this case. It may be that the First Circuit, to which I understand an appeal will be taken, will reverse the Board. It may be years before this controversy is disposed of.

It happens in this particular case all the intervening years are open, and that an adjustment can be made; but to come along with a proposition of this nature at this time is going

to make an upheaval in the rules of practice of the Bureau. This is the way we have been proceeding for years, and I don't think it is an issue before the Board. It was attempted to be raised in petitioner's motion of March 1, 1941, which was denied March 7, 1941.

There is nothing in the opinion regarding interest on this deficiency.

The Member: Your position is that there couldn't be any accrual of interest upon this item until the issue had been finally determined on the tax?

Mr. Transue: That is our position in all cases wherein that issue is present. In this particular case, it is my position that the issue is not before the Board. We would have to be given an opportunity to file briefs, and the Board would have to make a supplemental opinion.

The Member: Any further statement?

Mr. Grimes: If Your Honor please, I merely want to say that for convenience we shall submit to you printed copies of this, if you wish to have it for review.

I don't see that it is necessary to comment again on Mr. Transue's statement, except that when he says there was no issue before the Board on recomputation of net income, he is mistaken, because there were certain losses that were allowed either by stipulation or the Board's findings. There were two instances of that.

The question of inconvenience is one that needs no argument. If the law makes certain changes, obviously convenience must be subjected to the law.

The Member: I want a copy of the transcript. Did you say you would have the transcript printed?

Mr. Grimes: Yes, Your Honor.

Mr. Transue: I am sorry if I made any erroneous statement. I wasn't in the case before.

The Member: I don't think the income was stipulated.

There were certain adjustments made. I didn't fully appreciate your point, Mr. Transue, that there couldn't be any accrual of interest in this case until the court finally determined the tax.

FURTHER STATEMENT ON BEHALF OF PETITIONER.

Mr. Keeney: May I make one statement along that line?

The Member: Certainly.

Mr. Keeney: The question that Your Honor asked is really the vital question to the petitioner in this proceeding. It can readily be seen that the amount of interest becomes a very large amount. The petitioner is also probably subject to personal holding company tax. If the Government should take one position in settling this tax, and then in a later year reverse its position—that is, for instance, if the petitioner relied on the deduction coming all in one year, and then should be told that it was not in accordance with the statutes—it would result in a very large tax in that year.

Whichever way it is settled, speaking broadly, doesn't make so much difference. The petitioner is, however, entitled to have it determined that one method shall not be used in this case and another method when it starts to use the deduction.

The Member: I see that point.

(Whereupon, at 12:05 o'clock p. m., the hearing in the above entitled matter was adjourned.)

[Title omitted.]

DECISION.

[Entered March 29, 1941.]

Pursuant to the Board's findings of fact and opinion in the above-entitled proceeding promulgated March 20, 1940, 41 B. T. A. 590, the respondent, on April 5, 1940, filed his computation for entry of decision. On March 6, 1941, counsel for the petitioner filed two alternative computations for entry of decision. The respondent's computation is found to be in accordance with the Board's findings of fact and opinion. See Memorandum Sur Decision attached. Wherefore, it is ordered and decided that there are deficiencies in tax under section 104 of the Revenue Acts of 1928 and 1932, as follows:

1930	$1,817,686.10
1932	1,145,322.68
1933	1,147,111.92
Total	$4,110,120.70

Copies served on both parties.

CHARLES P. SMITH, *Member.*

[SEAL.]

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 83797.

CHICAGO STOCK YARDS COMPANY,
PETITIONER,
v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

JOSEPH N. WELCH, ESQ., EDWARD J. KEELAN, JR., ESQ., LAWRENCE E. GREEN, ESQ., JOSEPH K. MOYER, ESQ., and FRANCIS B. KEENEY, ESQ., for the petitioner.

PHILIP M. CLARK, ESQ., and STANLEY B. PIERSON, ESQ., for the respondent.

MEMORANDUM SUR DECISION.

[Entered March 29, 1941.]

SMITH: The petitioner disputes the correctness of the respondent's computation of deficiencies in tax for the years 1930, 1932, and 1933, and has filed two alternative computations for entry of decision.

The parties are in agreement as to the deficiency for 1930. In one of its alternative computations the petitioner contends that the deficiencies for 1932 and 1933 should be in the amounts of $1,081,788.93 and $1,053,711.41, respectively, instead of the amounts claimed by the respondent. The reductions in the deficiencies found by the respondent are due to the fact that the petitioner claims the right to deduct from the gross income of 1932, upon which the tax is computed, accrued interest for one year upon the deficiency for 1930, or $109,061.17, and for 1933 accrued interest in the amount of $160,586.92, composed of $109,061.17 representing one year's accrued interest upon the deficiency of 1930, and $51,525.75 accrued interest on the deficiency for 1932 computed at six percent per annum upon $1,081,788.93 for nine months, sixteen days from March 15 to December 31, 1933. (Correct computation of interest is $51,565.27.)

By its second alternative computation the petitioner contends that there are no deficiencies for the years 1932 and 1933 but overassessments for those years of $13,496.47 and $12,963.21, which are the amounts of tax shown to be due by the original returns. In this computation the petitioner claims the right to deduct from the gross income of 1932 accrued interest on the deficiency for 1930 of $109,061.17 and losses as follows:

(d) Amount ($327,307.55) paid to Central Manufacturing District Bank for notes of individuals and corporations; and Amount ($3,071,779.19) advanced to Stock Yards National Bank and Stock Yards Trust & Savings Bank	$3,399,086.74

Petitioner's computation thus results in a net loss for 1932 of $3,442,670.38. For 1933 the petitioner claims the deduction of $109,061.17 accrued interest on the deficiency for 1930, a loss of $1,800,000 representing "subordination of petitioner's deposits in the Live Stock National Bank," and a net loss carry-over from 1932 under section 117 of the Revenue Act of 1932 of $3,442,670.38. In this manner it computes a net loss for 1933.

This proceeding was submitted to the Board solely upon the question as to whether in 1930, 1932, and 1933 the petitioner was taxable under section 104 of the Revenue Acts of 1928 and 1932. The parties are fully in agreement as to the net income of the petitioner for each of the years involved. The petitioner by its alternate computations seeks to raise new issues involving the correct net income of the petitioner for each of the years 1932 and 1933. New issues may not be considered under Rule 50 of the Board's Rules of Practice. See *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308.

The respondent's computation is in accordance with the Board's findings of fact and opinion.

[Title omitted.]

MOTION TO FIX SUM OF BOND ON APPEAL.

[Filed June 13, 1941.]

Now comes the petitioner in the above-entitled action and moves that the Board fix the sum of the bond on appeal to the Circuit Court of Appeals at $6,919,300, said sum having been arrived at as follows:

1930 Deficiency	$1,817,686.10
Interest thereon from March 15, 1931 to December 28, 1943	1,394,414.24
1932 Deficiency	1,145,322.68
Interest thereon from March 15, 1933 to December 28, 1943	741,180.67
1933 Deficiency	1,147,111.92
Interest thereon from March 15, 1934 to December 28, 1943	673,511.84
Grand Total	$6,919,227.45

CHICAGO STOCK YARDS COMPANY,
Petitioner.
By J. N. Welch, Its attorney.

[Title omitted.]

ORDER FIXING AMOUNT OF BOND.

[Dated June 13, 1941.]

Upon application of the above-named petitioner to fix the amount of the bond on appeal to the United States Circuit Court of Appeals, it is ordered that the said bond be and the same hereby is fixed in the amount of $6,919,300.00.

CHARLES P. SMITH, *Member.*

[SEAL.]

[Title omitted.]

PETITION FOR REVIEW.

[Filed June 27, 1941.]

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes the Chicago Stock Yards Company, a Maine corporation, and petitions for review of the decision of the United States Board of Tax Appeals entered on March 29, 1941 in the above-entitled proceeding and says:

1. The nature of the controversy is as follows:

This is a Federal income tax case involving the income of a domestic corporation for the calender years 1930, 1932 and 1933.

One issue is whether the petitioner is subject to taxation for each of said calendar years under Section 104 of the Revenue Acts of 1928 and 1932. Section 104 is the section entitled "Accumulation of Surplus to Evade Surtaxes." The Commissioner determined that the petitioner was subject to taxation under that section for each of the years 1930, 1932 and 1933; and the Board of Tax Appeals in its said decision decided,

"That there are deficiencies in tax under section 104 of the Revenue Acts of 1928 and 1932, as follows:

1930	$1,817,686.10
1932	1,145,322.68
1933	1,147,111.92
Total	$4,110,120.70"

The other issue relates to a deduction for interest for the year 1932 upon any deficiency found in this action for the year 1930; and to a deduction for interest for the year 1933 upon any deficiency found in this action for the years

1930 and 1932. The petitioner kept its books of accounts and filed its income tax on the accrual basis. If in this action it is determined that there was a deficiency in income tax for 1930, then during 1932 and 1933 interest accrued upon such deficiency; and if it is determined that there was a deficiency in income tax for 1932, then during 1933 interest accrued upon such deficiency. After the trial of the above action before the Board of Tax Appeals and after the Board promulgated its findings of fact and opinion indicating deficiencies for 1930, 1932 and 1933, but before decision was entered by the Board, the petitioner by Motion for Special Rule filed March 1, 1941 and by Petitioner's Computation for Entry of Decision filed March 6, 1941, petitioned the Board to allow as a deduction in computing its net income for 1932 interest accrued during 1932 on any deficiency for 1930, and as a deduction in computing its net income for 1933 interest accrued during 1933 on any deficiency for 1930 and 1932. The Board declined to allow such deduction.

2. The party seeking review is the petitioner, the Chicago Stock Yards Company, a Maine corporation.

3. The petitioner made its return of the tax in respect of which the liability involved in this action arises to the Collector of Internal Revenue for the Massachusetts District whose office is located in the City of Boston, Massachusetts, within the circuit of the United States Circuit Court of Appeals for the First Circuit.

WHEREFORE, the petitioner prays that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action

be taken, to the end that the errors complained of may be reviewed and corrected by said Court.

/s/ J. N. WELCH,
/s/ FRANCIS B. KEENEY,
Attorneys for Petitioner on Review.

[Title omitted.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing [typewritten] pages, 1 to 1652, inclusive [printed pages 1 to 1243, inclusive] contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 27th day of October, 1941.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[SEAL.]

[MEMORANDUM. Orders of enlargement of time for docketing case to, and including, December 31, 1941, are here omitted. A. I. CHARRON, *Clerk.*]

[Title omitted.]

NOTICE OF FILING PETITION FOR REVIEW AND STATEMENT OF POINTS.

[Filed June 27, 1941.]

To:

You are hereby notified that Chicago Stock Yards Company did, on the 27th day of June, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above entitled case. Copies of the petition for review and the statement of points as filed are hereto attached and served upon you.

Dated this 27th day of June, 1941.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Service of copy of Petition for Review and Statement of Points acknowledged this 27th day of June, 1941.

J. P. WENCHEL,
Attorney for Respondent.

[Title omitted.]

STATEMENT OF POINTS.

[Filed June 27, 1941.]

Now comes the petitioner on review in the above-entitled proceeding and says that the following is a concise statement of points upon which it intends to rely on appeal.

The United States Board of Tax Appeals erred:

1. By the finding and ruling contained in said Findings of Fact (Finding #44) and Opinion (41 B.T.A. 590, at pages 612, 624) that the petitioner during the years 1930, 1932, and 1933 was a mere holding or investment company; and by relying upon said finding and ruling as a ground for its decision.

2. By the finding and ruling contained in said Findings of Fact (Finding #45) and Opinion (41 B.T.A. at pages 612, 624) that the petitioner during the years 1930, 1932, and 1933 permitted its gains and profits to accumulate beyond the reasonable needs of its business; and by relying upon said finding and ruling as a ground for its decision.

3. By the finding and ruling contained in said Findings of Fact (Finding #46) and Opinion (41 B.T.A. at page 612) that the petitioner during the years 1930, 1932, and 1933 was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed; and by relying upon said finding and ruling as a ground for its decision.

4. By the ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

> "As a holding company, the petitioner had no need for the accumulation of gains and profits."

and by relying upon said ruling as a ground for its decision.

5. By the ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

> "But even as a management company, we cannot see that the petitioner had need for the accumulation of a large surplus."

and by relying upon said ruling as a ground for its decision.

6. By the finding and ruling contained in its said Opinion (41 B.T.A. at page 620) as follows:

> "But the Jersey Co. is amply able to take care of both its own bonded indebtedness, and that of the Elevated Co."

and by relying upon said finding and ruling as a ground for its decision.

7. By the finding and ruling contained in its said Opinion (41 B.T.A. at pages 623, 624) as follows:

> "Although Prince testified that under his program it was contemplated that the Jersey Co. would be liquidated in 1940, there appears to be no necessity for its liquidation and many reasons why it probably will not be liquidated. When the petitioner was organized in 1911, an issue of $14,000,000 bonds was provided for. The petitioner covenanted with the trustee that it would do all that was necessary for it to do to continue the existence of the Jersey Co. The outstanding bonds of the petitioner are callable at 105, but if they are not called and paid off the petitioner is under obligation to continue the existence of the Jersey Co.
>
> "McDonough, petitioner's vice president, testified that either he or Prince had consulted counsel as to

the possibility of obtaining an extension or renewal of the Jersey Co.'s charter. Counsel advised that such an extension or renewal could undoubtedly be obtained under the New Jersey statutes. They simply require a consent of two-thirds of each class of stock of the old corporation. It is inconceivable that the petitioner can not obtain such a consent. It owns more than two-thirds of the common shares, and the preferred shares bearing a 6 percent dividend are well secured by assets and earnings.

"Upon a liquidation of the Jersey Co. in 1940 the petitioner would apparently be subject to heavy income taxes; for its investment in the common and preferred shares and in the bonds of the Jersey Co. and its subsidiaries would amount to not more than $35,000,000 and the assets acquired would apparently have a value, based upon cost, book values, and earnings, of more than $60,000,000. Although it may be desirable to merge or consolidate the petitioner and the Jersey Co. it seems doubtful whether the Jersey Co. will be liquidated in 1940."

and by relying upon the foregoing finding and ruling as a ground for its decision.

8. By failing to find as a fact in substance the following upon which the testimony introduced by witnesses for both parties was undisputed:

"At all material times it was sound business policy for the petitioner to plan to liquidate the Jersey Company in 1940."

9. By failing to find as a fact in substance the following: "The purpose of the petitioner in accumulating earnings during the years 1930 to 1933, inclusive, as well as prior thereto, was to acquire sufficient liquid

assets to purchase all Jersey Company common stock that could be purchased before 1940 at a reasonable price, to pay off all of the bonds of the petitioner and of the Jersey Company and of its subsidiaries by 1940, and to pay off all the outstanding preferred stock of the Jersey Company in 1940.

"This plan, as at the close of the year 1929, contemplated an accumulation of cash and liquid assets in the treasury of the petitioner, its subsidiary, Produce Terminal, and the Jersey Company and its subsidiaries, of approximately $36,000,000 divided as follows:

Total bonded indebtedness	$23,963,000.00
Preferred stock Jersey Co. (64,543 shares)	6,454,300.00
Common stock Jersey Co. (6,258 shares)	1,034,134.50
Working capital	5,000,000.00
Total	$36,451,434.50

The foregoing figures appear in the Board's Opinion (41 B.T.A. at page 619).

10. By the ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

"We do not see either that the petitioner had any need of an accumulation of gains and profits for the purpose of financing other corporations. It was not obligated on the principal of any bonds other than its own which were outstanding at December 31, 1929, in the amount of $3,227,000."

and by relying upon said ruling as a ground for its decision.

11. By the finding and ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

"The evidence shows the manner in which the petitioner has used its earnings from the date of incorporation. It has been free to use them in any manner it saw fit. It has used a large part of them in the purchase of shares of stock of the Jersey Co. The next most important item is loans made to Prince. During the years 1930 to 1933 the petitioner loaned $1,625,000 to District and $236,536.51 to the Pau Corporation. It had no financial interest in the latter. The necessity for these loans, if any existed, is not shown."

and by relying upon said finding and ruling as a ground for its decision.

12. By the finding and ruling contained in its said Opinion (41 B.T.A. at page 618) as follows:

"Certainly there is no indication of the need for any further accumulation in the years 1930, 1932, and 1933."

and by relying upon said finding and ruling as a ground for its decision.

13. By the finding and ruling contained in its said Opinion (41 B.T.A. at page 619) as follows:

"The plan as at the close of the year 1929 contemplated an accumulation of cash and liquid assets in the treasury of the petitioner, its subsidiary, Produce Terminal, and the Jersey Co. and its subsidiaries of approximately $36,000,000, divided as follows:

Total bonded indebtedness	$23,963,000.00
Preferred stock Jersey Company (64,543 shares)	6,454,300.00
Common stock Jersey Company (6,258 shares)	1,034,134.50
Working capital	5,000,000.00
Total	$36,451,434.50

The bonds and debenture notes of the petitioner and the Jersey Co. and its subsidiaries outstanding on December 31, 1929, were as follows:

Petitioner	
5% bonds maturing 1961	$ 3,227,000
Jersey Co.	
5% bonds maturing April 1, 1940	10,000,000
4% bonds maturing April 1, 1940	4,000,000
Transit Co.	
Debenture notes maturing 1930	500,000
Elevated Co.	
4% bonds maturing March 1, 1945	2,327,000
District maturing various dates to 1941	3,909,000
Total	$23,963,000

We do not think that an accumulation of surplus for the purposes above indicated was within the reasonable needs of the petitioner's business."

and by relying upon said finding and ruling as a ground for its decision.

14. By the finding and ruling contained in its said Opinion (41 B.T.A. at pages 619, 620) as follows:

"Clearly, there was no reasonable need for the petitioner to acquire the balance of the common stock and the outstanding preferred shares of the Jersey Co."

and by relying upon said finding and ruling as a ground for its decision.

15. By the finding and ruling contained in said Opinion (41 B.T.A. at page 621) as follows:

"In the proceeding at bar we do not think that the evidence shows a reasonable need of the petitioner for any further accumulation of gains and profits during any of the years 1930, 1932 and 1933."

and by relying upon said finding and ruling as a ground for its decision.

16. By failing to find as a fact the substance of the following:

> "Mr. Prince and the others in authority here had an expectation all during the years 1920 to 1933 inclusive, to liquidate the Jersey Company. The Maine Corporation did not have any purpose except the purpose of Prince, and the corporation can't have a purpose except the purpose of its officers or directors, and it is plain that it was Mr. Prince's idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares, to pay off not only all of the bonds of the Jersey Company in or before 1940 but all of the indebtedness of all of the other corporations."

17. By failing to find as a part of Finding #34 (41 B.T.A. at page 610) of said Findings of Fact as supplemented by order of the Board dated January 24, 1941 the following:

> "The total of the sale price of such of said securities as were sold by the petitioner and the market value of such as were held by it at the time of the trial exceeded the cost to the petitioner by a substantial amount."

18. By denying the petitioner's Motion for Rehearing and Further Hearing filed April 19, 1940 and by refusing to admit in evidence the evidence sought to be introduced in said motion and contained in an affidavit of James A. McDonough and a further affidavit of James A. McDonough filed in support of said notice.

19. By the following ruling contained in its said Opinion (41 B.T.A. at page 621):

"Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932."

and by relying upon said ruling as a ground for its decision.

20. By the following ruling contained in its said Opinion (41 B.T.A. at page 621):

"It should be borne in mind that the petitioner was solely owned by Prince from 1922 to June 1, 1932, and, for all practicable purposes, thereafter. The petitioner was the *alter ego* of Prince. It was Prince in corporate clothes. It was of no moment to Prince whether the earnings of the petitioner were carried in his individual pocketbook or in his corporate pocketbook, except that if they had been received in the first instance in his individual pocketbook or distributed to him by the petitioner he would have been subjected to heavy surtaxes upon them, while he avoided such surtaxes by retaining them in the corporation. The situation is analogous to that which obtained in *Helvering* v. *National Grocery Co., supra*, where an operating company organized in 1908 had accumulated a surplus of approximately $8,000,000 and had cash and securities on hand aggregating approximately $4,250,000, which represented four-fifths of the total accumulation of surplus profits during the last ten years."

and by relying upon said ruling as a ground for its decision.

21. By the following ruling contained in its said Opinion (41 B.T.A. at page 622):

> "The evidence shows that the petitioner was availed of by Prince for the purpose of reducing his own tax liabilities. Over a number of years Prince had accumulated more than 17,000 shares of Jersey Co. common stock upon which he was receiving an annual dividend of $9 per share. These were his own shares of stock. The dividends on them were taxable to him. In 1918 he transferred all of those shares of stock to the petitioner at cost and was thereafter relieved from the payment of surtax upon the dividends thereon."

and by relying upon said ruling as a ground for its decision.

22. By the ruling contained in said Opinion (41 B.T.A. at page 624) that the petitioner had failed to show on all the evidence that such gains and profits as were accumulated during the years 1930, 1932 and 1933 were not for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed.

23. By failing to find as a fact to be added to Finding #23 of said Findings of Fact the following:

> "At the time the transactions herein set forth were entered into, the petitioner anticipated that such transactions would result in a substantial loss to each of the companies participating in these transactions. By December 31, 1933, it was anticipated that the total loss would exceed $5,000,000; and at the time of trial it appeared that this anticipation was justified."

24. By the ruling contained in said Opinion that, in the absence of any express determination by the Commissioner

that the petitioner was a mere holding or investment company, there was any presumption that the corporation was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

25. By the ruling contained in said Opinion that (even if the Board were correct in its ruling that the petitioner was a mere holding or investment company and that such determination raises a statutory presumption that the corporation was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed) such presumption casts upon the petitioner any burden other than that of going forward with the evidence; and by failing to rule that the petitioner has gone forward with the evidence so that any such presumption as may have existed has disappeared from the case.

26. By the ruling contained in said Opinion that in the absence of any express finding by the Commissioner that the gains or profits of the petitioner were permitted to accumulate beyond the reasonable needs of the business, that there was any presumption that the corporation was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

27. By the ruling contained in said Opinion that (even if the Board were correct in its ruling that the gains or profits of the petitioner were permitted to accumulate beyond the reasonable needs of the business and that such determination raises a statutory presumption that the corporation was availed of for the purpose of preventing the

imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed) such presumption casts upon the petitioner any burden other than that of going forward with the evidence; and by failing to hold that the petitioner has gone forward with the evidence, so that any such presumption as may have existed has disappeared from the case.

28. By the ruling contained in said Opinion that the burden was upon the petitioner of establishing by a preponderance of evidence that the corporation was not availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

29. By failing to rule that the burden was upon the Commissioner to prove that the corporation was availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

30. By finding as a fact the last paragraph contained in Finding #24 (41 B.T.A. at page 601) of said Findings of Fact and by relying upon said finding as a ground for its decision.

31. By failing to find the following facts in lieu of the last paragraph in Finding #24 (41 B.T.A. at page 601) of said Findings of Fact:

> "The loans which the petitioner made to Prince were consistently used by him and his brokerage concern to buy securities of the stockyards corporations in which the petitioner had an interest or to restore to his brokerage firm money which had been expended by it in acquiring such securities, with the exception of one

sum of $160,000 which Prince borrowed from the petitioner in 1932 for a short period to finance the purchase of his Newport house until he could sell his North Shore place. The securities which the petitioner loaned to Prince were used by him as collateral to secure loans from banks for the purchase of securities of such stockyards corporations. In 1933 the petitioner loaned an amount of approximately $1,000,000 to Prince to enable him to acquire shares of stock of Armour & Co. common A and B shares and preferred stock at a cost to him of $1,067,389.50. With this acquisition of stock of Armour & Co., Prince became chairman of the Board of Directors of Armour & Co. In 1930 the loans of cash and securities actually decreased by $916,250. Over the four years, 1930-1933, the net amount of cash and securities loaned by the petitioner to Prince was $886,670. Included in this was the loan in 1933 of $1,000,000, which Prince used in the purchase for $1,067,389.50 of the Armour shares. This purchase was made to acquire control of the Armour stock so that the profitable Armour business would be kept in the stockyards enterprise."

32. By denying petitioner's Motion for Special Rule filed March 1, 1941 and by failing to allow as a deduction from net income in computing any deficiency for 1932 interest accruing during the year 1932 upon any deficiency found in this action for the year 1930 and interest accruing during 1933 for any deficiency found in this action for the years 1930 and 1932.

33. By finding and ruling that the petitioner was subject to taxation for 1930 under section 104 of the Revenue Act of 1928.

34. By finding and ruling that the petitioner was sub-

ject to taxation for 1932 under section 104 of the Revenue Act of 1932.

35. By finding and ruling that the petitioner was subject to taxation for 1933 under section 104 of the Revenue Act of 1932.

36. The Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to law.

J. N. WELCH,
FRANCIS B. KEENEY,
Attorneys for Petitioner on Review.

[Title omitted.]

DESIGNATION OF CONTENTS OF RECORD TO BE CONTAINED IN THE RECORD ON APPEAL.

[Filed July 23, 1941.]

Now comes the petitioner on review in the above-entitled proceeding and designates for inclusion in the record on appeal the complete record and all the proceedings and evidence taken in the action.

J. N. WELCH,
FRANCIS B. KEENEY,
Attorneys for Petitioner on Review.

[Title omitted.]

ORDER OF COURT.

August 12, 1941.

[Filed Aug. 14, 1941.]

Upon motion of petitioner for review, It is ordered that the original exhibits in this case be transmitted to this court as physical exhibits in lieu of reproduction thereof in the printed record on review to be treated as part of said record for reference thereto by the Court and by counsel with the same effect as though reproduced in the printed record; said exhibits, however, shall remain in the custody of the Board of Tax Appeals until ten days before the first day of the session in which this case shall be assigned for argument.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

[SEAL.]

A true copy.

Attest: ARTHUR I. CHARRON, *Clerk.*

[Title omitted.]

STIPULATION AS TO CONTENTS OF RECORD ON REVIEW.

[Filed Oct. 10, 1941.]

Now comes the parties in the above-entitled action and stipulate that the record on review shall consist of the following; it being agreed that this stipulation shall supersede the designation of contents of record filed by the petitioner on July 23, 1941, and that the record so constituted contains all the evidence received by the United States

Board of Tax Appeals at the trial and all other evidence and proceedings material to the review of the decision of the United States Board of Tax Appeals entered on March 29, 1941 in the above-entitled proceeding as prayed for by the petitioner, Chicago Stock Yards Company, in its petition for review filed June 27, 1941.

1. Copy for all docket entries.

2. Petition.

3. Amendment to petition filed May 29, 1936, and notice of deficiency dated January 27, 1936 and statement attached.

4. Answer.

5. Motion for leave to amend petition filed August 23, 1938, and amended petition.

6. Answer to amendment of petition, filed October 13, 1938.

7. Stipulation of facts (see Paragraph 32 hereof for exhibits).

8. Transcript of the proceedings at the trial before Mr. Sternhagen from January 30, 1939 to February 9, 1939, inclusive, including therein opening statements by counsel and oral argument by counsel, corrected in accordance with stipulation filed April 19, 1939.

9. Findings of fact and opinion of Board promulgated March 20, 1940.

10. Order of March 22, 1940 that findings of fact be corrected.

11. Computation of deficiency filed by general counsel April 5, 1940.

12. Motion to modify findings of fact and for additional findings of fact filed April 18, 1940.

13. Motion for further hearing filed April 18, 1940.

14. Motion for rehearing and further hearing filed April 18, 1940, and affidavit of James A. McDonough in support thereof.

15. Transcript of the proceedings before the Board on July 18, 1940, Messrs. Smith, Kern and Opper, sitting.

16. Motion and further affidavit of James A. McDonough filed July 18, 1940 and order of Board July 18, 1940 granting motion.

17. Order of Board of September 21, 1940 and memorandum sur order.

18. Transcript of the proceedings before the Board on October 1, 1940, Messrs. Smith, Kern and Opper, sitting.

19. Order supplementing Board's findings, filed January 25, 1941.

20. Order that parties file recomputations of deficiencies filed February 11, 1941.

21. Motion for special rule filed March 1, 1941.

22. Petitioner's computation for entry of decision filed March 6, 1941.

23. Order denying motions filed March 7, 1941.

24. Transcript of the proceedings before the Board on March 12, 1941, Mr. Smith, sitting.

25. Decision of Board of March 20, 1941 and memorandum sur decision.

26. Motion to fix the amount of bond filed June 13, 1941.

27. Order of June 13, 1941 fixing the amount of the bond.

28. Petition for review filed June 27, 1941.

29. Statement of points filed June 27, 1941.

30. Designation of contents of record filed July 23, 1941.

31. Order of court in re exhibits dated August 12, 1941.

32. Original exhibits numbered S-1 to S-69, inclusive, attached to the stipulation filed at the trial to be filed with the Clerk of the Circuit Court of Appeals for the First Circuit in original form in accordance with order of that Court.

33. Petitioner's original exhibits numbered 1 to 48, in

peals for the First Circuit in original form in accordance with order of that Court.

34. Respondent's original exhibits numbered A to YYYY, inclusive, to be filed with the Clerk of the Circuit Court of Appeals for the First Circuit in original form in accordance with order of that Court.

35. Order of the Board entered August 1, 1941 enlarging time. Not included in record.

36. Order of court enlarging time dated August 12, 1941. Not included in record.

37. This stipulation as to contents of record on review.

CHICAGO STOCK YARDS COMPANY
By J. N. WELCH,
LAWRENCE E. GREEN.

COMMISSIONER OF INTERNAL REVENUE
By J. P. WENCHEL,
Attorney for Respondent.

VOLUME IV

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 488

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHICAGO STOCK YARDS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 23, 1942
CERTIORARI GRANTED DECEMBER 7, 1942

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309133—47

United States Circuit Court of Appeals for the First Circuit

OCTOBER TERM, 1942

No. 3730, CHICAGO STOCK YARDS COMPANY, PETITIONER FOR REVIEW

v.

COMMISSIONER OF INTERNAL REVENUE

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On August 12, 1941, the following Order of Court was entered:

ORDER OF COURT

August 12, 1941

Upon motion of petitioner for review, It is ordered that the original exhibits in this case be transmitted to this court as physical exhibits in lieu of reproduction thereof in the printed record on review to be treated as part of said record for reference thereto by the court and by counsel with the same effect as though reproduced in the printed record; said exhibits, however, shall remain in the custody of the Board of Tax Appeals until ten days before the first day of the session in which this case shall be assigned for argument.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on February 19, 1942, the following Order of Court was entered:

ORDER OF COURT

February 19, 1942

Upon motion of petitioner for review, The statement of points is hereby amended by adding thereto the following:

37. The Board erred in admitting opinion testimony to the effect that the petitioner was a mere holding or investment Company.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on April 10, 1942, this cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Honorable John C. Mahoney, and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on July 24, 1942, the following Opinion of the Court was filed:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3730.

CHICAGO STOCK YARDS COMPANY,
PETITIONER FOR REVIEW,
v.
COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS.

BEFORE MAGRUDER, MAHONEY AND WOODBURY, J.J.

JOSEPH N. WELCH,
HALE AND DORR,
GEORGE WHARTON PEPPER,
for Petitioner.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General,
J. LOUIS MONARCH,
SEWALL KEY,
HELEN R. CARLOSS,
CARLTON FOX,
Special Assistants to the Attorney General.
J. P. WENCHEL, *Chief Counsel,*
CLAUDE R. MARSHALL, *Special Attorney,*
Bureau of Internal Revenue,
for Commissioner.

OPINION OF THE COURT.

July 24, 1942.

MAGRUDER, J. This petition for review brings before us a decision of the Board of Tax Appeals entered March 29, 1941, determining that there are deficiencies in income tax of Chicago Stock Yards Company for the years 1930, 1932 and 1933 totaling $4,110,120.70—for 1930, $1,817,686.10; for 1932, $1,145,322.68; for 1933, $1,147,111.92. The Board,

four members dissenting, thus upheld a ruling by the Commissioner that petitioner had become subject to the 50% penalty tax (in addition to the normal corporate income tax) imposed upon corporations formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, as provided by the identical provisions of § 104 of the Revenue Acts of 1928 and 1932. 45 Stat. 814–15, 47 Stat. 195. Section 104 is copied in full in the footnote.[1]

[1] "SEC. 104. ACCUMULATION OF SURPLUS TO EVADE SURTAXES.

"(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

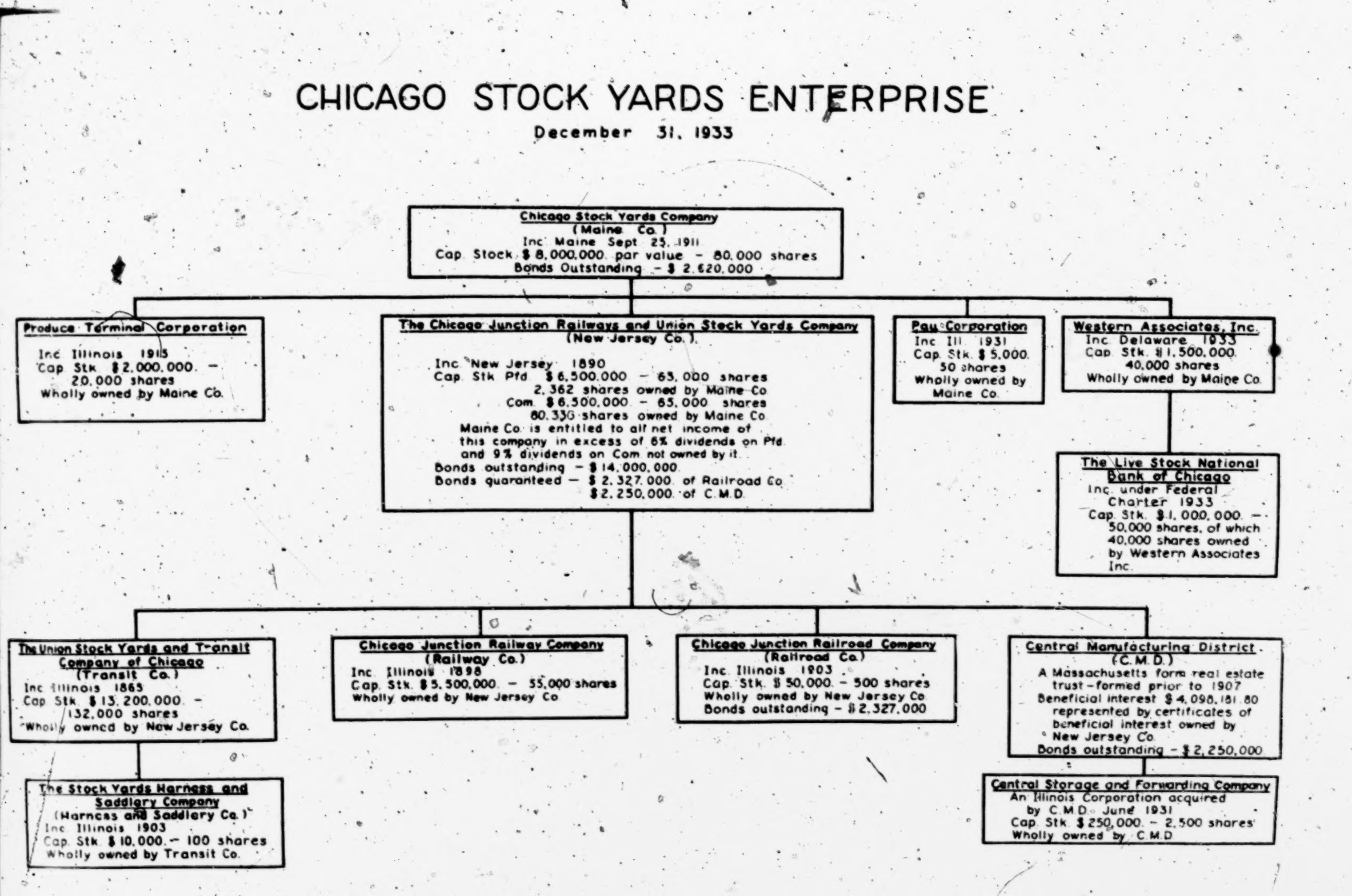
"(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax.

"(c) As used in this section the term 'net income' means the net income as defined in section 21, increased by the sum of the amount of the dividend deduction allowed under section 23(p) and the amount of the interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner.

"(d) The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of the earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included."

CHICAGO STOCK YARDS ENTERPRISE

December 31, 1933



Petitioner is the top holding company of what is called the Chicago Stock Yards Enterprise, a great integrated business owning or operating a stockyard, a belt line railway, an elevated street railway, a real estate development of considerable magnitude, power and light facilities, a national bank serving the stockyard area, and other related undertakings of minor importance. A diagram showing the organization of the Chicago Stock Yards Enterprise as of December 31, 1933, appears on the annexed insert. Reference is made to the findings of fact of the Board below for details of the history and development of the numerous related corporations. 41 B.T.A. 590. The lines of development were dictated from time to time by legal and business requirements which need not be elaborated in this opinion.

The original operating company was the Union Stock Yards & Transit Company of Chicago, hereinafter referred to as the Transit Company, an Illinois corporation created in 1865, with a borrowing capacity limited by charter to $500,000. The greater part of the Transit Company's stockyard business was derived from the big meat packing companies which had plants in Chicago west of the stockyards, in an area known as Packingtown. In 1890 the packers threatened to move away unless they were given a share of the profits of the stockyards business; to underscore this threat they purchased and developed a tract of land in Indiana at a cost of about $1,000,000.

Since the Transit Company could not raise the funds necessary to buy off the packers, Mr. Frederick H. Prince and other Transit Company shareholders proposed the organization of a new corporation with sufficient resources to meet the emergency. As a result, the Chicago Junction Railways & Union Stock Yards Company, hereinafter called the Jersey Company, was incorporated in New Jersey in 1890, with a corporate life limited to expire on July 10, 1940. At all times its authorized and issued capital stock

has consisted of 65,000 shares of preferred stock of $100 par value and 65,000 shares of common stock of $100 par value, each share of each class being entitled to one vote and the preferred stock being non-callable. It forthwith acquired 98% of the shares of the Transit Company, which, by the end of 1913, had become its wholly owned subsidiary. The Jersey Company in 1890 issued collateral trust bonds secured by Transit Company stock. It paid the various packers in cash and bonds the aggregate sum of $4,665,000 and thereby secured their commitment to keep their packing plants at Packingtown for a period of fifteen years.

With the expiration of the fifteen year period the packers were back again with their demands. Protracted negotiations followed. Finally, as a result of Prince's efforts, a new holding company for the enterprise, the petitioner, Chicago Stock Yards Company, was incorporated under the laws of Maine in 1911 with a cash capital of $1,000,000, and with broad power to purchase and lease real estate, to hold stocks and bonds of other corporations, to guarantee the obligations of others, and to carry on any other business which might seem to the company convenient to enhance the value of its properties. Prince became the owner of 80% of petitioner's capital stock, and Armour, the leading packer, the owner of 20%. The packers did not move away.

In 1920 Armour was ordered by a consent decree in the so-called *Packers* case to dispose of his shares in the Chicago Stock Yards Company. In 1922 Prince bought out Armour's shares in petitioner, with funds advanced by petitioner as a loan to Prince. Thus Prince became the sole stockholder in petitioner, and completely dominated its affairs thereafter. On June 1, 1932, F. H. Prince & Co. Inc. was organized under the laws of Maine, and its entire capital stock of 20,000 shares was issued for 48,000 common shares of petitioner owned by Prince. On June 3,

1932, Prince transferred to himself and his wife as trustees under a deed of trust, of which his relatives and friends were the beneficiaries, the 20,000 shares of F. H. Prince & Co., Inc., and since that date Prince has owned no stock in the latter company and the trustees have been the sole stockholders. This change in 1932 of the stock ownership in petitioner is assumed by both parties to be immaterial to the present litigation; in the deed of trust Prince reserved to himself the exclusive power to vote the 20,000 shares of stock of F. H. Prince & Co., Inc., and thus remained the dominant voice in petitioner.

Upon its formation in 1911 petitioner offered each common shareholder of the Jersey Company an option either (1) to have his common shares stamped with an agreement under which petitioner would guarantee such shareholder dividends of $9 per share on the Jersey Company common stock and the shareholder would assign to petitioner all dividends in excess of $9 per share, or (2) to exchange his shares for petitioner's 5% bonds on the basis of one share of Jersey Company common stock, par value $100, for $200 principal amount of petitioner's bonds, the bonds to be secured by the Jersey Company's common shares so exchanged. To provide for the purchase of all the Jersey Company's common stock under the second option above set forth, petitioner on October 2, 1911, executed a trust indenture authorizing the issuance of $13,000,000 5% 50-year callable gold bonds, secured by all the Jersey Company common shares owned or to be thereafter acquired by it. By August 31, 1914, petitioner had acquired in exchange for its bonds 31,075 Jersey Company common shares, and 33,922 shares had been stamped with the guaranty. During the succeeding years petitioner continually acquired more Jersey Company common stock, by purchase through the instrumentality of F. H. Prince & Co., a brokerage firm of which Prince was sole proprietor, and the principal business of which, apparently,

was to facilitate operations of petitioner in connection with the stockyards enterprise. On December 31, 1929, petitioner had acquired 58,742 of the 65,000 shares outstanding. On December 31, 1933, it had acquired 60,336 shares, of which 31,310 were acquired in exchange for $6,262,000 par value of the petitioner's bonds and 29,026 for $4,979,352.19 in cash. In the years 1929–1933 petitioner acquired 2,362 shares of Jersey Company preferred stock at a total cost of $218,933.33; it had made no purchases of such stock prior to 1929.

At some indefinite time after petitioner's formation Prince set as a goal the liquidation of the Jersey Company upon the expiration of its charter in 1940, the payment at or before that date of all the debts of petitioner, the Jersey Company, and their subsidiaries, and the complete ownership by petitioner of the whole stockyards enterprise debt free, and with an adequate working capital. In his direction of the affairs of petitioner up through the end of 1933, the last tax year now in question, Prince drove consistently toward the attainment of that goal.

Prince has been president of petitioner from the start. He became president of the Jersey Company; also chairman of the board of the Transit Company and chairman of the board of the Chicago Junction Railway Company. He dictated the policies and supervised the operations of the Jersey Company and all of its subsidiaries as well as of the subsidiaries of petitioner. He was enabled to do this, as the Board stated in its opinion, "through ownership of all the stock of the petitioner, which had virtual control through stock ownership of the other corporations."

On October 1, 1914, petitioner and the Jersey Company made a so-called "By-Pass Agreement". Under this agreement the Maine Company guaranteed to the Jersey Company the payment of all the latter's expenses and the interest upon the Jersey Company's bonds; guaranteed all pay-

ments the Jersey Company might be required to make by virtue of its guaranty of the interest, but not the principal, of the real estate bonds of the Central Manufacturing District and of the bonds of the Chicago Junction Railroad Company (the Elevated Company);[2] and guaranteed further the payment of dividends of 6% per annum upon the outstanding preferred shares of the Jersey Company and 9% per annum on the Jersey Company common shares. The Jersey Company on its part assigned and transferred to petitioner "all of its right title and interest in and to any dividends that may hereafter be declared by the Transit Company and the Railway Company respectively and all its right title and interest in and to all income and surplus earnings of the said companies or either of them that may now or hereafter be divisible or distributable among the shareholders of the said companies or either of them in the form of dividends or otherwise subject however to all obligations and agreements respecting such dividends and income as may now exist." Further, "all income of the New Jersey Company hereafter received or collected by it from any source whatever shall be by it applied first to the payment of its own expenses and second to the payment of all taxes payable and chargeable to the New Jersey Company and the surplus if any then remaining shall be paid to the Maine Company [petitioner] upon its request but subject however to any agreements or obligations on the part of the New Jersey Company now existing."

The enterprise flourished. Petitioner proceeded to build up in its own treasury a strong position in cash and liquid assets, with a view to achieving the goal set for 1940. In general, petitioner did not permit the various subsidiary companies to make accumulations which would normally

[2] The Jersey Company itself had guaranteed both the principal and interest of the District and of the Elevated Company bonds.

have been appropriate for their individual needs, but sucked up into its own treasury most of the available funds in the various component companies of the enterprise, and advanced funds to the subsidiaries as the need arose.[3] In a supplemental finding of fact the Board found:

"During the years 1922 to 1933, inclusive, the petitioner withdrew from the Jersey Co. and its subsidiaries in dividends more than the net earnings of the Jersey Co. and its subsidiaries for that period available for distribution to the petitioner."

For that reason petitioner makes the point that it is misleading to focus on the large technical earnings of the petitioner considered alone and not as a part of the integrated enterprise. Thus in 1933 the income of petitioner was $2,243,840.98. Of this income $1,716,000 came in the form of dividends from the Transit Company paid directly to petitioner under the by-pass agreement, though the Transit Company for that year had a loss of $827,463.49; and $200,000 came from dividends declared by Produce Terminal Corporation which had income for that year of only $29,850.39. Under the circumstances the Transit Company and Produce Terminal might, with propriety, have refrained from declaring dividends during that year, which would have resulted in reducing the income of petitioner for 1933 below the amount ($400,000) which it actually paid out in dividends that year.

The situation of petitioner on December 31, 1929, was found by the Board to be as follows:

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[3] Thus in the years 1930–1933 petitioner lent to Central Manufacturing District amounts as follows: 1930, $800,000 to meet the District's maturing bonds; 1932, $275,000 to meet bonds maturing in that year and $275,000 to assist in the erection of a building upon land sold by the District; 1933, $275,000 to meet maturing bonds. Petitioner lent to the Pau Corporation, for the purpose of purchasing machinery installed in the plant of Produce Terminal, $189,563.34 in 1932 and $47,033.17 in 1933.

"The petitioner, upon a paid-in cash capital of $1,000,000, had an earned surplus of $19,615,905.69 and a capital surplus of $6,450. It owned all of the capital stock of Produce Terminal, carried at a value of $1,032,431.95, and Central Manufacturing District Co.,* carried at a cost of $506,488; 58,742 Jersey Co. common shares out of 65,000 outstanding, carried at a cost of $10,993,551.74; and 457 Jersey Co. preferred shares out of 65,000 outstanding, carried at a cost of $45,821.50. The Produce Terminal was a prosperous corporation. It had net earnings of $262,213.73 for 1929 and annual average earnings of $172,517.68 for the five-year period ended with 1929. It paid dividends to the petitioner from 1928 to 1933, inclusive, at the rate of $200,000 per annum. Its excess of assets over liabilities at December 31, 1929, was $2,552,017.05; although carried on the petitioner's books at a value of $1,032,431.95.

"The petitioner had outstanding at December 31, 1929, 5 per cent bonds in the amount of $3,227,000. Its excess of assets over all liabilities, including its capital stock on that date, was $19,622,355.69."

As of the close of the year 1929 the program above indicated called for the accumulation by 1940 of cash and liquid assets to take care of the following:

Bonds of petitioner maturing 1961	$3,227,000
Bonds of Jersey Company maturing April 1, 1940	14,000,000
Debenture notes of Transit Co. maturing 1930	500,000
Bonds of Elevated Company maturing 1945	2,327,000
Bonds of District maturing up to 1941	3,909,000
Total bonded indebtedness	$23,963,000
Preferred stock Jersey Co. (64,543 shares)	6,454,300.00
Common stock Jersey Co. (6,258 shares)	1,034,134.50
Working capital	5,000,000.00
Total objective of the plan	$36,451,434.50

* "A company of no present importance, not to be confused with Central Manufacturing District, a Massachusetts Trust owning and developing tracts of land adjoining the stockyards with a view to building up additional tonnage for the Railway Company.

The following liquid assets were at that date available in the enterprise for the execution of the program:

Petitioner	
Cash	$6,689,304.26
Accounts receivable	252,447.08
Notes receivable (Prince)	3,104,400.00
District 6's 1930	27,000.00
District 5's	55,733.00
Transit Co. 5 1/2's	15,022.50
Other investments	1,467,338.35
Produce Terminal	
Cash	499,575.93
Total	$12,110,821.12
Jersey Co. and subsidiaries*	9,594,363.94
Total	$21,705,185.06

*Includes impounded charges of $2,013,523.54 which were not released to the Transit Co. until 1932.

At the end of 1933 the liquid assets of petitioner had increased about $2,000,000 but this was swallowed up by a decrease of $4,000,000 in the liquid assets of the enterprise as a whole. Thus, though the obligations of the whole enterprise had decreased by about $3,000,000, the excess of its obligations over the liquid assets available had increased by about $1,000,000 as of December 31, 1933. This was due chiefly to the fact that petitioner and certain subsidiaries had been obliged to sink millions of dollars into various stockyard banks in order to prevent their failure and consequent shock to the stockyards enterprise. In respect to the bank crisis the Board made the following findings:

"During the years 1930, 1931, 1932, and 1933 the petitioner, the Jersey Co., and some of that company's subsidiaries had large deposits in banks in the stockyards district or its vicinity. The petitioner and some of the subsidiaries

of the Jersey Co. owned shares of stock in such banks. If the banks failed the depositors stood to lose a large part of their deposits and the stockholders might be subject to a 100 per cent assessment upon their stock. Prince believed that it was necessary to protect these banks. He was particularly interested in maintaining the solvency of the Stock Yards National Bank, which was known throughout the country as the Stock Yards Bank. The failure of that bank would be a serious blow to the Jersey Co. and its subsidiaries.

"In order to assist the banks the Transit Co. in 1929 paid $464,000 for shares of capital stock of Stock Yards National Bank and purchased real estate bonds from the Stock Yards Trust & Savings Bank for $100,000.

"In 1931 Produce Terminal purchased from the Central Manufacturing District Bank real estate bonds for $490,000 cash. In 1932 the petitioner purchased notes of individuals and corporations from the Central Manufacturing District Bank, paying therefor $501,439.58. These were carried in its balance sheet at December 31, 1932, at a value of $327,307.55. The petitioner loaned $2,971,799.19 to the Stock Yards National Bank and the Stock Yards Trust & Savings Bank. The Transit Co. during this year purchased debentures of the Stock Yards Investment Co., an affiliate of the Stock Yards National Bank, for $1,340,000 and Produce Terminal purchased similar debentures for $350,000.

"In 1933 the Transit Co. loaned to the Stock Yards Bank & Trust Co. $1,016,414.84 in Government bonds. This loan became a loss to the Transit Co. in 1933. The banks needing further assistance, the petitioner agreed to subordinate $1,800,000 of its deposits in the Live Stock National Bank to the claims of other depositors. The Transit Co., Produce Terminal, and District likewise subordinated deposits in the amounts of $1,300,000, $300,000, and $600,000, respectively. The subordinated deposits were to be paid only out of certain assets which the bank was not allowed by the bank examiners to treat as good assets. The agreement for the subordination of the deposits was that the repayment would be made by the bank out of recoveries from unacceptable assets which were written off on the books of the bank, such recoveries to be applied, in the first instance, to the amounts subordinated by the petitioner."

"Western Associates, Inc., a corporation wholly owned

by the petitioner, was organized in January 1933 under Delaware law to enable the petitioner to hold the shares of the Stock Yards Bank & Trust Co., which was formed on January 1, 1933, as a consolidation of the Stock Yards National Bank and the Stock Yards Trust & Savings Bank, and later to hold the shares of the Live Stock National Bank of Chicago. It received $1,500,000 from the petitioner on the issue of its 40,000 shares of capital stock and immediately paid it to the Stock Yards Bank & Trust Co., a bank organized under Illinois law and located in the stockyards district of Chicago, for 40,000 shares of that corporation's capital stock. In April 1933 the Stock Yards Bank & Trust Co. was reorganized, and Western Associates, Inc., received in exchange for the shares of that bank 40,000 shares of the capital stock of the resulting Live Stock National Bank of Chicago. Western Associates, Inc., has owned these shares since that time."

During the years 1930–1933 there grew up among the packers a practice of buying livestock directly from the farmers in the country, shipping to smaller stockyards and conveying it by truck to the packing houses, thereby avoiding the Chicago stockyards entirely. Packing houses had also been built in Iowa and southern Minnesota, causing a shrinkage in the revenue of the Chicago stockyards in the years 1930–1933. As found by the Board: "In 1932–1933 Prince, with the funds in the form of notes furnished by the petitioner, purchased $1,000,000 of stock in Armour & Co., sufficient to enable him to become chairman of the board of directors of that company and retain its business for the Chicago stockyards."

From 1924 and on through 1933 petitioner followed a consistent policy of paying out $400,000 annually in dividends, which is at the rate of 5% on the par value of its capital stock. The net income of the petitioner (considered alone and not as part of the whole enterprise) and the dividends paid by it in the years 1911–1933, were as follows:

Year.	Net earnings.	Dividends paid.	Excess of net earnings.
1911–1929	$24,375,905.69	$4,760,000	$19,615,905.69
1930	3,468,336.80	400,000	3,068,336.80
1931	2,358,232.14	400,000	1,958,232.14
1932	2,172,963.09	400,000	1,772,963.09
1933	2,243,840.98	400,000	1,843,840.98

Thus the net earnings of the petitioner for the four years 1930-1933 were $10,243,373.01. Of these earnings $1,600,000 was paid out in dividends, $8,069,074.36 is represented by an increase in assets, and $574,298.65 went in reduction of liabilities.

If petitioner had distributed its whole net income for each of the years 1930, 1932 and 1933, the surtax liability of F. H. Prince would have been increased as follows:

1930	$572,234.91
1932	386,582.33
1933	377,706.61

The stockholders of petitioner did not report any of the undistributed earnings of that company in the years 1930, 1932 and 1933 under the provisions of § 104 (d) of the Revenue Acts of 1928 and 1932.

The Board made its concluding findings as follows:

"During the years 1930, 1932, and 1933 the petitioner was a mere holding or investment company.

"During the years 1930, 1932, and 1933 the petitioner permitted its gains and profits to accumulate beyond the reasonable needs of its business.

"During the years 1930, 1932 and 1933 the petitioner was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed."

Under § 104 the tax is not imposed upon a mere showing that the accumulation of earnings resulted in a saving of

surtaxes to the shareholders; the section requires, further, the ascertainment of a subjective state—a specific purpose in the mind of the person or persons who made the corporate decision to accumulate earnings rather than to distribute them. The genesis of § 104 is found in the very similar language of the Tariff Act of 1913, 38 Stat. 166–167. That act, however, imposed the additional tax on the shareholders rather than on the corporation. The same was true in the Revenue Act of 1916, 39 Stat. 758, and in the Revenue Act of 1918, 40 Stat. 1072; but § 220 of the latter act struck out the word "fraudulently" from the phrase "fraudulently availed of", which appeared in the earlier acts. In the 1921 Act, 42 Stat. 247–48, the incidence of the tax was shifted to the corporation. When the 1924 Act was pending, complaints were made of the ineffectiveness of the penalty tax, due to the fact that it depended upon the finding of a specific forbidden purpose. See Sen. Rep. No. 398, 68th Cong., 1st Sess., p. 9; 65 Cong. Rec. 7360. Nevertheless, the tax was reenacted, with an increase in the rate from 25 to 50 per cent. 43 Stat. 277. Its shortcomings were again discussed when the 1928 Act was pending (see 69 Cong. Rec. 519–21, 7976–77), but neither in that year, 45 Stat. 814–15, nor in 1932, 47 Stat. 195, was any substantial change made. The corresponding sections of the 1934 and 1936 Acts, 48 Stat. 702 and 49 Stat. 1676, introduced a graduated rate turning on the amount of profits undistributed, but left in the requirement as to purpose, despite the fact that the House Report in the latter year recorded that the difficulty of proving the specific purpose had rendered the section more or less ineffective. (H. Rep. 2475, 74th Cong., 2d Sess., p. 5.) Finally, however, the 1934 Act took cognizance of the inadequacies of the existing law by imposing a new tax, a high surtax on the undistributed profits of "personal holding companies," that is, corporations 80 per cent of whose gross income for the taxable year is derived from royalties,

dividends, interest, annuities, or gains from the sale of stock or securities, and whose stock to the extent of more than 50 per cent is owned by not more than five individuals. 48 Stat. 751–52. This tax was aimed especially at the "incorporated pocketbook" (H. Rep. 704, 73d Cong., 2d Sess., p. 11), and was imposed upon the undistributed profits as such, without regard to the purpose of the accumulation. See *Noteman* v. *Welch*, 108 F. (2d) 206 (C.C.A. 1st, 1939). The 1936 Act imposed still another tax, a somewhat lower surtax on undistributed profits of corporations generally (other than personal holding companies), again without regard to purpose. 49 Stat. 1655–57.

From this review of the legislative history it is apparent that in applying § 104 of the Revenue Acts of 1928 and 1932, care must be observed not to confuse the *effect* of the accumulation on shareholders' surtaxes with the *purpose* of the accumulation. This section of the 1928 and 1932 Acts cannot be read and applied so as to do the job of § 351 of the 1934 Act (the surtax on personal holding companies, now §§ 500–511, Int. Rev. Code) or of § 14 of the 1936 Act (the surtax on undistributed profits of corporations generally).

The ascertainment of purpose, under § 104, involves a finding of fact, and none the less so because the fact happens to be a state of mind. Necessarily, a state of mind can generally be proved only by inference from circumstantial evidence, for direct testimony of what was in a man's mind can only come from the man himself.[5] Within the area in which reasonable men might differ as to the proper inference to be drawn, the Board's inference of purpose cannot be reviewed by us, Congress having chosen to provide that the courts may modify or reverse a decision of the Board only

[5] The Board was not bound to accept as true Prince's testimony disclaiming any purpose on his part to avoid the imposition of surtaxes. *Helvering* v. *National Grocery Co.*, 304 U.S. 282, 295 (1938).

if the decision "is not in accordance with law", 44 Stat. 110; Int. Rev. Code, § 1141(c)(1). "It is the function of the Board, not the Circuit Court of Appeals, to weight the evidence, to draw inferences from the facts, and to choose between conflicting inferences." *Wilmington Trust Co.* v. *Helvering*, U.S. Sup. Ct., April 27, 1942. This has been applied, specifically, to a finding by the Board of Tax Appeals of the existence of the forbidden purpose described in § 104. *Helvering* v. *National Grocery Co.*, 304 U.S. 282, 294 (1938); *Olin Corp.* v. *Commissioner*, C.C.A. 7th, May 22, 1942; *Wilkerson Daily Corp., Ltd.* v. *Commissioner*, 125 F. (2d) 998, 1000 (C.C.A. 8th, 1942); *United Block Co.* v. *Helvering*, 123 F. (2d) 704 (C.C.A. 2d, 1941); *Commissioner* v. *Cecil B. De Mille Productions, Inc.*, 90 F. (2d) 12 (C.C.A. 9th, 1937). Nor is the rule any different, as petitioner contends, when the subsidiary facts are undisputed. *Wilmington Trust Co.* v. *Helvering, supra.*

Petitioner makes the further point that we are free in this case to draw our own inference as to purpose, upon review of the evidence de novo, since the decision below was made by the votes of members of the Board who did not hear the witnesses, over the dissent of the Board member who sat at the hearing. We know of no authority to sustain this contention. The inference of purpose drawn by the Board is still a finding of fact, though derived from a record made up of testimony and documentary evidence presented before a single member. Certainly this court is in no better position than was the Board to draw the correct inference from the facts in the printed record. A similar situation is found in cases under the National Labor Relations Act, where the testimony, customarily, is heard by a trial examiner. In *Nevada Consolidated Copper Corp.* v. *National Labor Relations Board*, 122 F. (2d) 587 (C.C.A. 10th, 1941), the issue whether the employer was guilty of an unfair labor practice depended upon a finding of the employer's purpose in re-

fusing to reemploy a number of its former employees after a shutdown. The Board, upon the record made before the trial examiner, found that the employer had discriminated against the men in order to discourage membership in a certain labor union. See 26 N.L.R.B. 1182, 1186. The circuit court of appeals refused to enforce the Board's order, concluding that its findings were not supported by substantial evidence, and stating: "When the evidence is consistent with either of two inconsistent hypotheses, it establishes neither" (p. 595). On certiorari the Supreme Court reversed the judgment below with directions to enforce the Board's order. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, April 27, 1942. The court stated: "There was also substantial evidence from which the Board could have concluded, as it did, that respondent's motive for refusing the employment was discouragement of membership in a labor union. The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the Board from drawing one of them, as the court below seems to have thought." See also *National Labor Relations Board* v. *Burry Biscuit Corp.*, 123 F. (2d) 540, 543 (C.C.A. 7th, 1941).

Since petitioner was incorporated in 1911, prior to the passage of the 16th Amendment, it is obvious that it was not formed for the condemned purpose of diminishing the surtaxes of its stockholders.

On the issue whether petitioner was "availed of" for that purpose during the years now in question, petitioner makes an argument which it earnestly insists is conclusive in its favor as a matter of law. It is said that the plan of accumulation toward the 1940 goal was inaugurated prior to the passage of the 16th Amendment and that therefore the plan in its inception could not have been devised for the interdicted purpose; that if the plan was bona fide when formed, "and if the accumulation was carried out in honest

accordance with it, then it must follow that the corporation was always availed of for only one purpose—*and that was the carrying out of the plan*", that Congress in § 104 could never have intended that the abandonment in mid-passage "by any type of company of a pre-existing policy of lawful accumulation should be the only means of escape from a penalty tax predicated upon a purpose of evasion."

We have at least two difficulties with this line of argument.

In the first place, though petitioner was organized in 1911, the record fails to establish just when the plan of accumulation toward the glittering goal of 1940 was conceived. There appears to be no contemporaneous documentary evidence of the plan. Prince himself testified that "after the Maine Company [petitioner] was formed," he and Mr. Armour talked the matter over, "and we realized that in 1940, it would be advisable to liquidate the Jersey Company . . ." The word "after", of course, is indefinite enough as to time;[6] furthermore, whenever the purpose to prepare for the liquidation of the Jersey Company in 1940 may have been formed, it by no means follows that the idea crystallized at the same time to accumulate such huge funds in petitioner's treasury as would enable petitioner to be the sole owner of the vast stockyards enterprise wholly debt free in 1940. As a matter of fact, petitioner had no net income in 1911 or 1912. It was not until 1913 that it had any profits to accumulate; in that year it had a net income of $2,429,105.18, and paid out in dividends $200,000. Thus, at the time when petitioner actually began to accumulate profits there was on the books the first federal income-tax law, imposing modest graduated surtaxes upon individual

[6] In its statement of points, petitioner charges the Board with error in failing to find as a fact that "Mr. Prince and the others in authority here had an expectation during the years *1920* to 1933 inclusive, to liquidate the Jersey Company." [Italics ours.]

incomes. 38 Stat. 166. There was, then, even at that early date, a conceivable tax motive for allowing corporate profits to be accumulated instead of being distributed to the shareholders, a motive which Congress at that time anticipated and sought to discourage.

In the second place, even if the plan of accumulation had been inaugurated in 1911, necessarily for some purpose other than that forbidden in § 104, it would not follow as a matter of law that the continued execution of the plan in the years now in question could not have been motivated by two or more purposes, one of them the forbidden purpose. For example, suppose that A in 1911 created the X Corporation, of which he became the sole stockholder, and conveyed to it large holdings of corporate stock and securities, with the plan of having the X Corporation accumulate and reinvest all the income from such securities, and in the expectation of leaving to his son at his death a huge fortune in the form of stock of the X Corporation. Such a plan of accumulation would have had an innocent purpose at its inauguration; but if the plan were continued in execution by the dominant stockholder during the succeeding thirty years, the facts would surely warrant an inference that in the latter years the corporation was availed of at least in part for the purpose of diminishing A's surtaxes.[7] It has

[7] In *National Grocery Co.* v. *Commissioner*, 35 B.T.A. 163 (1936), the corporation was organized in 1908 for the purpose of operating a chain of grocery stores. The Board found that there had been an accumulation during 1931 for the forbidden purpose and sustained the tax. Seven members of the Board dissented, including three of the four members who dissented in the case at bar. The dissenting opinion made the argument advanced by petitioner in the present case: "The corporation merely continued its long continued practice of 'plowing its earnings back into the business'. Indubitably it had in the earlier years no 'purpose of preventing the imposition of the surtax on its shareholders' for there was no surtax to escape. There had been no 'sudden change of policy, coincident with large increases in the surtax rates [which] might

been held that the tax under § 104 cannot be avoided unless the corporation succeeds in establishing that the purpose of the accumulation was "wholly other than that of preventing surtax upon its shareholders—not only that there was another purpose, but that there was a complete absence of the disapproved purpose." *R. L. Blaffer & Co.* v. *Commissioner*, 37 B.T.A. 851, 856, affirmed, 103 F. (2d) 487, cert. denied, 308 U.S. 576, rehearing denied, 308 U.S. 635. See *Williams Investment Co.* v. *United States*, 3 F. Supp. 225, 232 (Ct. Cl., 1933). Perhaps this is too strong a statement; but at least it is clear that § 104 would apply if in the totality of reasons which induced the continuing of the accumulation the forbidden motive of surtax avoidance played a substantial part. *Cf. Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. (2d) 794, 798 (C.C.A. 2d, 1938), cert. denied, 306 U.S. 648 (1939); *Basker* v. *Cushing*, 270 Mass. 230, 233 (1930).

In ascertainment of the existence of the forbidden purpose, § 104(b) provides a procedural aid: "The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax." This is spoken of as a "presumption" in *Helvering* v. *National Grocery Co.*, 304 U.S. 282, 294 (1938). The normal function of a presumption is to assist the party having the burden of proof; the other party, if he would hope to prevail, must "show his hand" (*United Business Corp.* v. *Commissioner*, 62 F. (2d) 754, 755 (C.C.A. 2d, 1933)), that is, he must go forward with evidence warranting a finding contrary to the presumed fact. If he does this, his adversary, having the

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• • • betray a purpose to accumulate against a season more propitious for distribution.' (*United Business Corporation, supra.*) It had pursued the same policy throughout the years." Nevertheless, the Supreme Court upheld the Board's decision. *Helvering* v. *National Grocery Co.*, 304 U.S. 282 (1938).

burden of proof, must then satisfy the trier of the facts on the preponderance of the evidence. But where a taxpayer petitions the Board for redetermination of a deficiency found by the Commissioner, the taxpayer has the burden of proving that the Commissioner's determination was wrong. *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933); *Helvering* v. *Taylor*, 293 U.S. 507, 515 (1935). The taxpayer in any such case must necessarily "show his hand," and more. Therefore, so far as the presumption is concerned, § 104(b) would seem not to amount to much;* it is more "like a handkerchief thrown over something covered by a blanket also." *Brown* v. *Henderson*, 285 Mass. 192, 196 (1934).

The Board found that the petitioner, during the years in question, "was a mere holding or investment company." We do not think that this is a permissible finding on the record, particularly in view of the subsidiary facts found by the Board. See *Industrial Bankers Securities Corp.* v. *Higgins*, 104 F. (2d) 177 (C.C.A. 2d, 1939). *Cf. Chevrolet Motor Company* v. *United States*, 64 Ct. Cl. 211, 222, cert. denied, 277 U.S. 585 (1928).

The logical core in the presumption as to a "mere holding company" is that a company which does nothing but hold securities and collect the income therefrom has no need to build up any accumulation of profits; and that if such a company does so, that fact in itself is persuasive evidence that the accumulation was for the purpose of saving surtaxes to the shareholders. The Board said in its opinion: "As a

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* The Revenue Act of 1938, 52 Stat. 483, amended the section so as to provide that the fact of unreasonable accumulation "shall be determinative of the purpose to avoid surtax upon shareholders unless the corporation by the clear preponderance of the evidence shall prove to the contrary." By this amendment the presumption seems to have the effect of increasing the taxpayer's normal burden of proof by requiring a greater quantum of proof to sustain the burden.

holding company, the petitioner had no need for the accumulation of gains and profits." The corresponding phrase in the original income tax law was "a mere holding company." 38 Stat. 167. It remained so until the Revenue Act of 1924, which amended the phrase to read "a mere holding or investment company." 48 Stat. 702. This was done at the behest of the Treasury, which had had difficulty "in applying this section in the case of pure investment companies which invest their entire net income." (House Rep. No. 179, 68th Cong., 1st Sess., p. 22.) The Secretary of the Treasury thought that under the provisions of the earlier acts it was questionable whether any investment company could have a surplus beyond the reasonable needs of its business, since its sole business was to invest. (65 Cong. Rec. 7354–55.)

In the present case, petitioner was formed to be the directing head of the whole integrated enterprise, supplanting, in that respect, the Jersey Company, which became a "mere shell." Its purpose was to keep the enterprise intact, not to milk it dry and allow it to disintegrate in 1940. The commitments petitioner made in 1911 by guaranteeing dividends of 9 per cent on the common stock of the Jersey Company, and the guarantee it made in the "by-pass agreement" of 1914, made it necessary for petitioner, in protection of its investment, to exercise an active supervision over the underlying operating companies, whose continued success was so vital to its own financial health. Since, under the by-pass agreement, it drew up into its own treasury the earnings of the subsidiary companies without allowing the individual companies to make the accumulations which they normally would have needed for their own corporate purposes, petitioner, as banker for the enterprise, necessarily had to have a very substantial accumulation of funds at its disposal.

Considering petitioner's activities and commitments, it seems to us to be a good deal more than a "mere holding

company" having "no need for the accumulation of gains and profits." Certainly, from the businessman's point of view, petitioner's business is the business of the stockyards enterprise as a whole. The enterprise is a close-knit organism composed of many corporate members, of which petitioner is the corporate head, supplying the direction and coordination. This appears clearly enough from the facts already stated, and in the Board's findings, not previously quoted:

"Until his death in 1926 J. A. Spoor was president of the Transit Co. and in complete control of the Transit Co., Railway Co., and Elevated Co. He sent reports to F. H. Prince & Co. in Boston. After Spoor's death Prince became chairman of the board of directors of the Transit Co. and *representatives of the petitioner went to Chicago with increasing frequency, giving orders and directions.*[*] [Italics ours.] There was daily contact by telephone between the men operating the companies in Chicago and the officers of the petitioner. Prince handled the stockyards banking situation from 1930 to 1933. Ultimate choice as to officers, directors, and other personnel was dictated by Prince and he decided dividend policies. He also gave instructions as to the banks in which funds were to be deposited and his authority was necessary for unusual expenditures by the Transit Co. After the destruction of part of the stockyards by fire, the president and vice president of the petitioner went to Chicago and gave orders as to what buildings should be rebuilt and how. The yards were not entirely restored. The restoration was paid for with insurance funds received by the Transit Co. In certain instances suggestions of the officers in Chicago were rejected by Prince. In 1933 Prince refused to permit the Transit Co. to spend enough money to build fireproof hog and sheep houses requested by the men in Chicago. Prince granted permission to rebuild the amphitheatre in which the International Live Stock Exposition was held.

"Produce Terminal, the Transit Co., the District, and the Railway Co. sent to the petitioner monthly reports showing a summary of operations, which, except for the District's

[*] A. G. Leonard, who succeeded Spoor as president of the Transit Company, testified: "Well, the Maine Company [petitioner] was practically in the saddle, and I was about the hired man."

report, were copies of reports required by the Illinois Commerce Commission, the form of reports by the Transit Co. having been devised by its auditors. The petitioner assisted the District on many occasions in financing the construction of buildings. In 1932 it furnished between $300,000 and $400,000 for one building."

Notwithstanding this, the Board says in its opinion: "It does not appear, however, that the petitioner supervised and managed the operations of its subsidiaries and those of the Jersey Co. and its subsidiaries. Prince did this himself." How else could petitioner act except through the human beings who were its officers? Every corporation is controlled by some human being or group of human beings, but it is of the essence of the corporate privilege that the acts of the human beings in the exercise of the corporate powers are attributed to the corporation as a separate legal entity. It is all right to speak of petitioner as "Prince in corporate clothes"—so, if a partnership of fifteen members incorporates, the corporation may be described as the partnership in corporate clothes. This does not advance the argument much. Prince's stock ownership enabled him to sit in the driver's seat as president of petitioner. In that capacity he exercised petitioner's corporate powers. Among these powers, as the Board itself said, was petitioner's "virtual control through stock ownership of the other corporations" in the enterprise. It is of no significance in this connection that "petitioner received no fees for management and supervision"; under the circumstances, this would have been a superfluous bookkeeping formality. Nor is it important that petitioner "had practically no office expenses", and no large force of employees. For general supervision of the enterprise it needed only the brains of an executive of high caliber. Prince has been receiving $50,000 a year as president, and petitioner has regularly deducted this expense on its income tax returns, without challenge from the Commissioner, so far as appears.

As to the "presumption" predicated upon a finding that profits have been permitted to accumulate beyond the reasonable needs of the business, this again has a logical core which would have had significance even without the specific provision in § 104(b), for if the accumulation cannot be accounted for as in response to business needs this fact may be persuasive evidence that the accumulation was for the purpose of saving surtaxes to the shareholders. The weight of such evidence would vary with the circumstances. For instance, the inference of forbidden purpose would more readily be drawn where the sole or dominant stockholder, who would profit greatly by a saving of surtaxes, is himself the human being who made the corporate decision to accumulate rather than to distribute, than it would be where the stock was held by a large number of persons in comparatively small blocks. Again, the greater the percentage of accumulation over reasonable business needs, the stronger becomes the inference of forbidden purpose, other things being equal.

As already indicated, the fact that the profits have, or have not, been accumulated in excess of reasonable business needs is not the ultimate operative fact upon which the penalty tax in § 104(a) depends. Thus, though the accumulation may have been within the reasonable needs of the business, judged by objective standards, the other evidence might indicate that the directors, in deciding to withhold the distribution of dividends, were concerned not so much with providing for business needs (as to which, as a matter of judgment, they may have been in doubt) as with the desire to avoid heavy surtaxes to shareholders. See *United Business Corp. v. Commissioner*, 62 F. (2d) 754, 755 (C.C.A. 2d, 1933). On the other hand, even where the accumulation may be in excess of reasonable business needs, judged by objective standards, the other evidence might indicate that the directors, in deciding upon the accumula-

tion, were influenced solely by their sincere, though mistaken, judgment as to the extent of the business needs, and were not affected at all by a consideration of the incidental effect on shareholders' surtaxes. Of course, human nature being what it is, a finding to that effect would be quite unlikely in a case where the corporate decision was made by a sole or dominant stockholder who stood to gain by the withholding of distribution.

We agree with petitioner that the Board, in arriving at its finding that profits were accumulated beyond the reasonable needs of the business, used an improper "legal yardstick" by which to measure those needs.

In its opinion the Board stated (1) that as a holding company, petitioner "had no need for the accumulation of gains and profits"; (2) that even as a management company it had no need "for the accumulation of a large surplus", for the only expenses connected with the management were the payment of salaries and wages in the amount of $52,500 per year, and the annual income amply provided that revenue; (3) that it had no need of an accumulation "for the purpose of financing other corporations", for it was not obligated on the principal of any bonds other than its own, and so far as concerned its guaranty of interest on the bonds of the Jersey Company and its subsidiaries, "petitioner had never been required to pay out a dollar under its guaranty"; (4) that as respects its own bonds petitioner already had on hand at the close of 1929 more than twice as much cash as was necessary to redeem them; (5) that "there was no reasonable need for the petitioner to acquire the balance of the common stock and the outstanding preferred shares in the Jersey Co.", for amounts spent in the acquisition of those shares "simply represented investments by the petitioner"; (6) that the same also is true of any amounts expended in acquiring the bonds of the Jersey Company and its subsidiaries, for these bonds "were well

secured by deposit of collateral"; (7) that petitioner had no reasonable need to make provision for the liquidation of the Jersey Company in 1940; (8) that in any event there was "no indication of the need for any further accumulation in the years 1930, 1932 and 1933."[10]

The narrow view of petitioner's needs thus taken by the Board proceeded from a failure to recognize petitioner's business as that of the stockyards enterprise as a whole. Accumulation "for the reasonable needs of the business" is not limited to making provision for the bare legal obligations of the corporation but may include accumulation in furtherance of a reasonable business program for protection and enhancement of the corporation's pecuniary interests. Furthermore, considering only petitioner's strictly legal obligations, it may well be that petitioner, in view of its course of conduct under the by-pass agreement, was legally obliged to safeguard the interests of stockholders and creditors of the Jersey Company and its subsidiaries. See *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307 (1939); *Vallery* v. *Denver & Rio Grande R.R. Co.*, 236 Fed. 476 (C.C.A. 8th, 1916).

The corporate needs must be judged from the standpoint of the corporation doing business as a legal entity separate and distinct from its shareholders. It is hardly fair to argue as the Board does: "It was of no moment to Prince

[10] But the Government's own experts all agreed that petitioner should have made some further accumulations in the taxable years, the estimates varying from 30 to 66 2/3 per cent. At the end of 1929 the total bonded indebtedness of the enterprise was $23,963,000, as against liquid assets (minus minimum working capital of $5,000,000) of $16,705,185.06—a spread of $7,257,814.94. At the end of 1933 the total bonded indebtedness of the enterprise was $21,197,000, as against liquid assets (minus minimum working capital of $5,000,000) of $12,829,900—a spread of $8,367,100, an increase of over $1,000,000. If all of petitioner's earnings had been paid out in dividends in the years 1930–1933, as the Board says ought to have been done, this adverse spread would have been further increased by many millions of dollars.

whether the earnings of the petitioner were carried in his individual pocketbook or in his corporate pocketbook, except that if they had been received in the first instance in his individual pocketbook or distributed to him by the petitioner, he would have been subjected to heavy surtaxes upon them, while he avoided such surtaxes by retaining them in the corporation." Prince is mortal; petitioner is endowed with at least potential immortality. A corporation would not be providing adequately for its own needs and legal commitments if it paid out all of its earnings in dividends and relied upon its stockholders coming to its rescue as the need arose.

Petitioner controls and directs the stockyards enterprise. It has a legitimate business need to preserve that control, and to keep the enterprise intact as a going concern. Petitioner's own bonds are secured by pledge of its Jersey Company stock. It is true, as the Board says, that the $14,000,000 of Jersey Company bonds were well secured by collateral. That collateral, however, included all of the stock of Chicago Junction Railway Company and practically all of the stock of the Transit Company, the sale of which would have resulted in the dismemberment of the enterprise.

Planning for the liquidation of the Jersey Company in 1940 was for petitioner a reasonable business need. It is true, as the Board says, that this liquidation was not "inevitable"; unforeseen circumstances might arise to make it impracticable to liquidate the Jersey Company, and naturally enough, as against this contingency, Prince took pains to assure himself of the possibility of obtaining a renewal of the Jersey Company charter. But all the Government's experts, as well as the witnesses for petitioner, expressed the opinion that it was desirable to liquidate the Jersey Company and the part of wisdom to provide for such liquidation. It was desirable in the interests of simplifying the

corporate structure of the enterprise. The Jersey Company served no useful function, and remained as a superfluous intermediate holding company, vulnerable to taxation. There was a reasonable business need for petitioner to acquire sufficient of Jersey Company common and preferred stock to be able to control the Jersey Company's liquidation. As to the Jersey Company shares not acquired by petitioner, a prudent board of directors would consider the desirability of redeeming these shares otherwise than by a distribution of stock in the operating companies, so as to avoid possible embarrassment to petitioner's holding company operations by minority stockholders owning some of the stock of subsidiaries in the enterprise.

There is a necessary distinction, difficult to draw in a case like the present, between the corporation's reasonable business needs and the personal ambitions of Prince, its sole stockholder. It would be very nice for Prince to own a $60,000,000 "empire," as he called it, free of debt in 1940.[11] It is obvious that such an ambition might be more rapidly achieved by accumulation of profits in petitioner's treasury free of individual surtaxes on stockholders. But it would not necessarily be a reasonable need of petitioner, considered as a separate legal entity, to accumulate in the enterprise by 1940 liquid assets sufficient to pay off all the debts

[11] James A. McDonough, assistant to Prince, testified to a conversation he had with Prince some time in 1933:

"A. He said he was accumulating the stock of the New Jersey Company, and that he wanted to take and be in a position in 1940 where he would own all of the stock, that he could close up the company and liquidate it in 1940, and at that time he said he wanted $10,000,000 of working capital, free cash, in the till of the Maine Company to meet any emergencies that might arise.

"Q. Did he say anything about wanting it free of debt?

"A. Yes, sir. That was the principal theme; that in 1940 he wanted to have this entire property free of debt and $10,000,000 in cash in the treasury."

of the various companies, to buy up all the outstanding shares of Jersey Company common and preferred, and in addition to have a fidy working capital.

Granting that it may be a reasonable business need for a corporation to make provision for eventual extinguishment of all debts, the rate at which current profits should be accumulated for that purpose depends upon a variety of factors, including a forecast of the probable trend of future earnings and an estimate of the probability of putting through a partial refinancing on favorable terms on the dates when the various obligations mature. From 1923 through 1929 there was a steady decline totalling about $5,000,000 in the outstanding bonded indebtedness of the enterprise. The Central Manufacturing District bonds were serial bonds maturing annually, the last maturity date being March 1, 1941. The Chicago Junction Railroad Company bonds, which would have been worthless but for the guaranty of principal and interest by the Jersey Company, mature in 1945. The biggest maturity to be met in 1940 was the $14,000,000 issue of Jersey Company bonds. On December 31, 1929, the enterprise as a whole had on hand more than enough liquid assets to pay off this issue in full. That would release the valuable Transit Company stock and Railway Company stock pledged as collateral and open up to petitioner the possibility of putting out in 1940 a considerable new issue of bonds. Or petitioner might be able to raise additional capital in 1940 by an issue of preferred stock.[12]

[12] This of course would be inconsistent with the personal ambition of Prince but ordinarily a corporation could not be said to have a reasonable business need of having all its stock held by one stockholder. See *Williams Investment Co.* v. *United States*, 3 F. Supp. 225, 232 (Ct. Cl., 1933). Prince could maintain his position as sole stockholder by subscribing out of his personal fortune to the whole of the new issue of preferred stock.

These and other considerations would be in the minds of a reasonable board of directors in determining petitioner's dividend declarations for the taxable years now in question.

The Board's ultimate finding of forbidden purpose was predicated chiefly upon its findings that petitioner was a mere holding or investment company and that petitioner had accumulated its profits beyond the reasonable needs of the business, coupled with the fact that Prince saved a large amount of surtaxes by the withholding of further dividends.

In addition, the Board pointed to the considerable loans which petitioner made to Prince from time to time, citing *Helvering* v. *National Grocery Co.*, 304 U.S. 282, 293–94 (1938). The Board said: "There is no satisfactory explanation of why the petitioner did not make a dividend distribution to Prince of the funds which he needed." During 1930, one of the years in question, the net amount of the loans to Prince decreased by about $900,000. However, during the period 1930-1933 Prince's net debt to petitioner increased by $886,070; which increase was more than accounted for by the loan of $1,000,000 to Prince in 1933 to enable him to purchase a large block of stock in Armour & Company. This purchase, as indicated by the Board's finding which we have previously quoted, redounded to the benefit of petitioner. The significance of the loans to Prince is tied up with the question whether petitioner has accumulated profits beyond the reasonable needs of the business. If, on a proper view, such accumulations were deemed to be not unreasonable, this would suggest a possible reason why loans were made to Prince instead of increased dividends. The loans bore interest and were amply secured by a deposit of collateral, and hence did not impair petitioner's plan of accumulation. Of course, if there were no need of any further accumulation in 1933, the loan of $1,000,000 to Prince in that year to enable him to buy his way into Armour & Com-

pany; instead of paying a dividend to him in that amount, would take on added significance.

In further support of its ultimate finding, the majority opinion stated:

"It furthermore appears that in 1931, 1932, and 1933 Prince sold securities to the petitioner for $120,193.21, $138,108.35, and $59,664, respectively, which enabled him to deduct from gross income in his income tax returns for those years losses of $196,124.68, $221,629.08, and $93,102.22, respectively, and in 1932 the petitioner sold to F. H. Prince & Co., Inc., which was organized by Prince on June 1, 1932, shares of the capital stock of the Stock Yards National Bank and of the Central Manufacturing District Bank, which enabled the petitioner to claim a deductible loss of $221,202.03. The shifting of these securities from Prince to the petitioner and from the petitioner to Prince really meant no economic loss to Prince and the investment by the corporation of the amounts of money spent in acquiring the securities from Prince was not in furtherance of the program which Prince claims to have had for the corporation."[13] This would not be an instance of using the corporation to save surtaxes "through the medium of permitting its gains and profits to accumulate." *W. S. Farish & Co.* v. *Commissioner*, 38 B.T.A. 150, 155 (1938), affirmed, *Commissioner* v. *W. S. Farish & Co.*, 104 F. (2d) 833 (C.C.A. 5th, 1939). All that happened was a change in the form of the accumulation. Here again, the transactions did not impair the plan of accumulation. At most, these transactions might be taken to indicate that Prince was not wholly unmindful of tax consequences nor averse on principle to minimizing taxes.

Since we hold that the Board committed errors of law in arriving at its main subsidiary findings, upon which its ultimate inference of forbidden purpose chiefly rested, the case should be remanded to the Board for further consid-

[13] In a supplemental order the Board added to its findings the following: "All of the securities sold by F. H. Prince & Co., Inc., to the petitioner in 1930, 1932, and 1933 were marketable securities and were sold to the petitioner at market price."

eration of its findings and decision in the light of this opinion. When all is said and done, the Board will have before it the ultimate question whether petitioner has sustained the burden of proving that the Commissioner's determination was wrong, that is, whether the Board is satisfied on a preponderance of the evidence that in Prince's decision on behalf of petitioner to distribute no more than $400,000 in dividends in each of the taxable years, the forbidden motive of surtax avoidance played no substantial part.

The decision of the Board of Tax Appeals is vacated and the case is remanded to the Board for further proceedings not inconsistent with this opinion.

On the same day, to wit, July 24, 1942, the following Final Decree was entered:

FINAL DECREE

July 24, 1942

This cause came on to be heard April 10, 1942, upon the record on petition for review of the United States Board of Tax Appeals, and was argued by counsel.

Upon consideration whereof, it is now, to wit, July 24, 1942, here ordered, adjudged and decreed as follows: The decision of the Board of Tax Appeals is vacated and the case is remanded to the Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on August 10, 1942, mandate issued to the Board of Tax Appeals.

CLERK'S CERTIFICATE

I, ARTHUR I. CHARRON, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the four volumes, entitled as follows:

Volume I, Record on Petition for Review, pages 1–574, inclusive;

Volume II, Record on Petition for Review, pages 575–900 inclusive;

Volume III, Record on Petition for Review, pages 901–1261, inclusive;

and

Volume IV, Proceedings in Circuit Court of Appeals, pages 1263–1397, inclusive;

this certificate being attached to each of said four volumes, contain and are a true copy of the record and all proceedings to, and including, October 16, 1942, in the cause in said court numbered and entitled,

No. 3730, CHICAGO STOCK YARDS COMPANY, PETITIONER FOR REVIEW

v.

COMMISSIONER OF INTERNAL REVENUE

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this sixteenth day of October, A. D. 1942.

ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE, 1942

Supreme Court of the United States

No. 488. October Term, 1942

Order Allowing Certiorari

Filed December 7, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

COPY

OCT. 23 1942

No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1942

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO STOCK YARDS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 488

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO STOCK YARDS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above cause on July 24, 1942.

OPINIONS BELOW

The opinions in the United States Board of Tax Appeals (3 R. 932–956), are reported in 41 B. T. A. 590. The opinion of the Circuit Court of Appeals (4 R. 1265–1297) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered July 24, 1942 (4 R. 1298). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals improperly rejected findings of the United States Board of Tax Appeals, (a) that during the taxable years in question the taxpayer was a mere holding or investment company, (b) that it permitted its gains and profits to accumulate beyond the reasonable needs of its business, and (c) that it was availed of for the purpose of preventing the imposition of the surtax upon its shareholders, within the meaning of Section 104 of the Revenue Acts of 1928 and 1932.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 104. ACCUMULATION OF SURPLUS TO EVADE SURTAXES.
>
> (a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net

income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax.

(c) As used in this section the term "net income" means the net income as defined in section 21, increased by the sum of the amount of the dividend deduction allowed under section 23 (p) and the amount of the interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner.

(d) The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corpora-

> tion out of the earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included.

The provisions of Section 104 of the Revenue Act of 1932, c. 209, 47 Stat. 169, are identical with those of Section 104 of the Revenue Act of 1928, except as subdivision (a) of Section 104 of the Revenue Act of 1932 was amended by Section 214 of the National Industrial Recovery Act (c. 90, 48 Stat. 195) which provides as follows:

> SEC. 214. Section 104 of the Revenue Act of 1932 is amended by striking out the words "the surtax" wherever occurring in such section and inserting in lieu thereof "any internal-revenue tax." The heading of such section is amended by striking out "surtaxes" and inserting in lieu thereof "internal-revenue taxes." Section 13 (c) of such Act is amended by striking out "surtax" and inserting in lieu thereof "internal-revenue tax."

The Treasury regulations applicable to Section 104 are set forth in the Appendix, *infra*, pp. 24–27.

STATEMENT

The central question involved is whether the taxpayer corporation, Chicago Stock Yards Company, was "availed of" during the years 1930, 1932, and 1933 for the purpose of preventing the imposition of surtax upon its stockholders by per-

mitting its gains and profits to accumulate instead of being distributed. The Commissioner determined that the corporation had been availed of for that purpose, and accordingly proposed to assess the 50% tax imposed by Section 104 of the Revenue Acts of 1928 and 1932. (3 R. 932–933.) The Board of Tax Appeals affirmed the Commissioner's determination, and approved the imposition of additional taxes for the years involved, aggregating in excess of $4,000,000 plus interest (3 R. 958, 1238–1239, 1240). It made extensive findings of fact (3 R. 902–932), which may be summarized as follows:[1]

The Chicago Stock Yards Company is a Maine corporation; it was organized in 1911 (3 R. 902), at which time Mr. Frederick H. Prince became the owner of 80.6% of its capital stock.[2] He acquired the remaining stock in 1922 (3 R. 909) with funds advanced to him by the corporation (3 R. 926), and throughout the years in question continued to own or control 100% of the stock.[3]

[1] In view of the complexity of the findings, it is not feasible to recount all the details. The summary set forth above is intended as an outline of the important relevant facts, but since respondent may disagree as to what are the important relevant facts, we respectfully refer the Court to the findings themselves (3 R. 902–932) for a complete statement.

[2] Of the 80,000 shares issued, Prince became the owner of 64,480 shares in November, 1911 (3 R. 907–908). In June 1922, he became the owner of the remaining 15,520 shares (3 R. 909).

[3] In 1932, he transferred a substantial portion of the stock to F. H. Prince & Co., Inc., a corporation owned entirely by himself, and then transferred the F. H. Prince & Co., Inc. stock to himself and his wife as trustees for the benefit of

The taxpayer is the top holding company of what is referred to as the Chicago Stock Yards enterprise, a great integrated business owning or operating a stockyard, a belt line railway, an elevated street railway, a real estate development of considerable magnitude, power and light facilities, a national bank serving the stockyard area, and other related undertakings of lesser importance. For the convenience of the Court, we have annexed a diagram, adopted by the court below, showing the organization of the entire enterprise as of December 31, 1933. Although several of the undertakings are under the control of corporations immediately owned by the taxpayer (for example, the power and light activities are conducted by the Produce Terminal Corporation, which is wholly owned by the taxpayer), the great bulk of the enterprise is concentrated in corporations and a Massachusetts trust that are wholly owned by an intermediate holding company, the Chicago Junction Railways and Union Stock Yards Company, a New Jersey corporation, referred to as the Jersey Company.[4]

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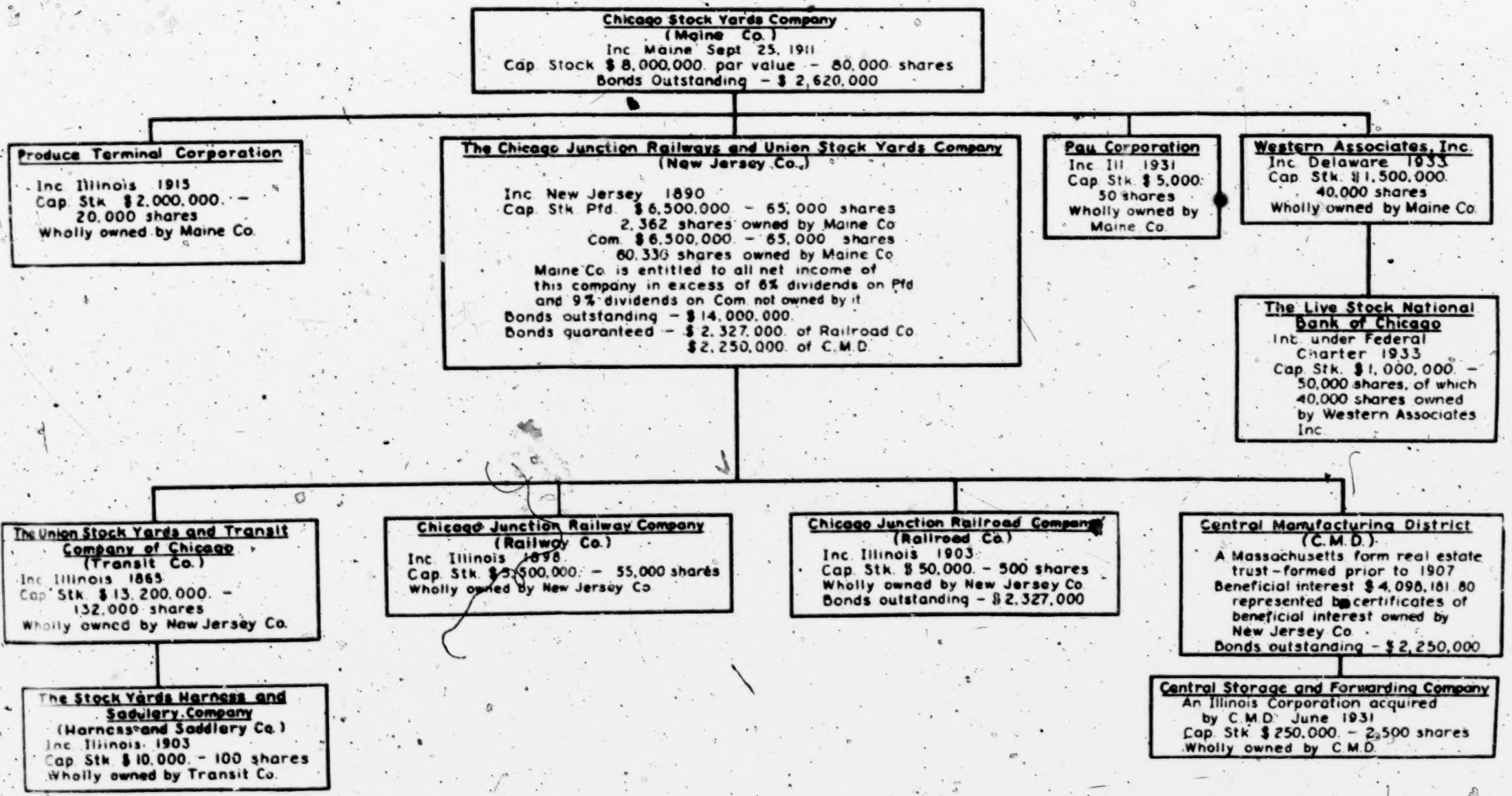
certain relatives and friends (3 R. 910). Mr. Prince thus retained the power to vote the stock, and as a result remained in complete control of the taxpayer. As pointed out by the court below (4 R. 1269), the 1932 change of stock ownership "is assumed by both parties to be immaterial to the present litigation."

[4] The Jersey Company was organized in 1890 with a corporate life of 50 years (3 R. 902). Its principal subsidiaries are as follows:

(1) The Union Stock Yards and Transit Company of Chicago, referred to as the *Transit Company*, operated the

CHICAGO STOCK YARDS ENTERPRISE

December 31, 1933



The capital stock of the Jersey Company consisted of 65,000 shares of common and 65,000 shares of voting preferred. In addition it had a bonded indebtedness of $14,000,000 which was to mature in 1940. (3 R. 903.) By December 31, 1929, the taxpayer had acquired 58,472 shares of the Jersey

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stockyards. It was organized as an Illinois corporation in 1865. During the years 1911–1913 more than 98 percent of its capital stock was owned by the Jersey Company, and since that time it has been wholly owned by the Jersey Company. It had debenture notes outstanding in the amount of $500,000, which were paid off in 1930, and it has had no bond or note obligations thereafter. (3 R. 902.)

(2) The Chicago Junction Railway Company, referred to as the *Railway Company*, owned a railroad which served the stockyards. It was organized as an Illinois corporation in 1898, and is wholly owned by the Jersey Company. It leased its railroad to the Transit Company at an annual rental of $600,000, which in turn leased it to a subsidiary of the New York Central Railroad at an annual rental of $2,000,000. During the years 1930–1933, it had no outstanding indebtedness. (3 R. 903–904.)

(3) The Chicago Junction Railroad Company, referred to as the *Elevated Company* or the Railroad Company, owned and operated an elevated railroad serving Packingtown, an area where the large meat packing companies had their plants, located in Chicago west of the stockyards. It was organized in 1902 and has always been wholly owned by the Jersey Company. It had outstanding bonds in the principal amount of $2,327,000, due in 1945. These bonds were guaranteed by the Jersey Company. (3 R. 904–905.)

(4) The Central Manufacturing District, referred to as the *District*, a Massachusetts trust wholly owned by the Jersey Company, owned extensive real estate adjacent to the stockyards. It had its own streets and police, water, lighting, and sewerage facilities. It had bonds outstanding which ranged from $2,915,000 in principal amount in 1930, to $2,250,000 in principal amount in 1933. These bonds were guaranteed by the Jersey Company. (3 R. 905.)

Company's common and 457 shares of the preferred (3 R. 912). During the period here in controversy, 1930–1933, the taxpayer added to its holdings in the Jersey Company, and at the end of 1933, it held 60,336 shares of common and 2,362 shares of preferred (3 R. 927–928).[5]

On October 1, 1914, the taxpayer and the Jersey Company had entered into an agreement (referred to as the bypass agreement), whereby the taxpayer guaranteed the interest, but not the principal, upon the $14,000,000 bonds of the Jersey Company and upon the $2,327,000 bonds of the Elevated Company; it also guaranteed a $6 dividend upon the Jersey Company's preferred stock and a $9 dividend upon its common.[6] On its part, the Jersey Company assigned to the taxpayer its right to all dividends received from its subsidiaries, and directed the Railway Company to apply the $600,000 received as annual rental for its railroad, to interest on the Jersey Company's bonds. The Jersey Company further agreed to use its income

[5] Thus, it purchased 253 shares of common in 1930, 604 shares in 1931, 380 shares in 1932, and 357 shares in 1933; and it purchased 190 shares of preferred in 1930, 616 shares in 1931, 302 shares in 1932, and 797 shares in 1933 (3 R. 927–928).

[6] Upon formation of the taxpayer in 1911, the common stock holders of the Jersey Company were given the option of exchanging their stock for bonds of the taxpayer or retaining the stock and accepting the taxpayer's guaranty of a $9 annual dividend but assigning any excess to the taxpayer (3 R. 906–907).

first to pay its own expenses and taxes, and then to pay the surplus to the taxpayer upon its request. (3 R. 908.) The taxpayer has never been called upon to make any payments pursuant to its guarantees (3 R. 931).

On December 31, 1929, the Jersey Company and its subsidiaries had total net consolidated assets in the amount of $73,322,871.58 and net consolidated liabilities in the amount of $33,194,175.08, leaving an excess of over $40,000,000 in assets (3 R. 913). In addition, Produce Terminal Corporation, owned directly by the taxpayer, was a prosperous corporation, with over $2,500,000 in assets in excess of liabilities (3 R. 912–913). On December 31, 1929, the taxpayer itself had an earned surplus and an excess of assets over all liabilities (including its capital stock) of over $19,000,000 (3 R. 912–913). Its bonded indebtedness at that time was $3,227,000 (3 R. 913), and it had liquid assets of nearly $12,000,000[7] (3 R. 914).

The total net earnings of the taxpayer for the four years, 1930–1933, were $10,243,373.01, and out of these earnings it paid an aggregate of only $1,600,000 in dividends (3 R. 919). The net income of the taxpayer and the dividends paid by it during

[7] Produce Terminal Corporation together with the Jersey Company and its subsidiaries had additional liquid assets in the amount of about $10,000,000. This latter figure, however, includes certain impounded charges in the amount of about $2,000,000 which were not released to the Transit Company until 1932 (3 R. 914).

the years 1911–1933 are shown by the following tabulation (3 R. 918):

Year	Net earnings	Dividends paid	Excess of net earnings
1911–1929	$24,373,905.69	$4,790,000	$19,615,905.69
1930	3,468,336.80	400,000	3,068,336.80
1931	2,378,232.14	400,000	1,978,232.14
1932	2,172,963.09	400,000	1,772,963.09
1933	2,243,840.98	400,000	1,843,840.98
	34,637,278.70	6,390,000	28,259,278.70

During the years 1930–1933, inclusive, and prior thereto, the principal activity of the taxpayer was the purchase and holding of securities and the collecting of dividends thereon, together with the lending of money to Mr. Prince (3 R. 931). In its income tax returns for those years it described its business as that of "acquiring and guaranteeing securities" (3 R. 931–932).

The taxpayer's income during the years 1930–1933 consisted exclusively of interest, dividends, and profit upon sale of securities. It received no fees for the management and supervision of any of its subsidiaries. It had practically no office expenses; it paid no rent except vault rent, and its office was Prince's office at 1 Court Street, Boston. It paid its treasurer a salary of $500 per annum and "wages" of $2,000 per annum. Apart from the $50,000 salary which it paid to its president, Prince, it paid no other salaries or wages. McDonough, its vice president and Prince's secretary, did not receive any salary from the taxpayer. (3 R. 937.)

Moreover, in addition to his salary from the taxpayer, Prince received the following annual salaries from the taxpayer's affiliates in the capacities indicated below (3 R. 929):

President of the Jersey Co.	$17,500.00
Chairman of the board of directors of the Transit Co.	17,500.08
Chairman of the board of directors of the Railway Co.	12,499.92

And although Prince actively supervised the operations of the Jersey Company and its subsidiaries as well as the subsidiaries of the taxpayer, he was enabled to do so through his ownership of all the taxpayer's stock. Furthermore, in the light of the salaries received by Prince from the Jersey Company, the Railway Company, and the Transit Company, the Board found that when he was directing the affairs of those companies, he was acting as a paid employee of those companies and not of the taxpayer. (3 R. 938.)*

The taxpayer made many cash loans to Prince over the period of its existence, and Prince's in-

* Some of the facts stated in the above paragraph are not separately denominated as "findings" by the Board, but appear in the body of its opinion at 3 R. 937, 938. However, it is settled that determinations of fact, even though in the body of the Board's opinion, must be treated as findings. *Sheppard & Myers, Inc.* v. *Commissioner*, 45 F. (2d) 50 (C. C. A. 3d), certiorari denied, 282 U. S. 902; *Emerald Oil Co.* v. *Commissioner*, 72 F. (2d) 681 (C. C. A. 10th); *American Textile Woolen Co.* v. *Commissioner*, 68 F. (2d) 820 (C. C. A. 6th), certiorari denied, 293 U. S. 558; *Olson* v. *Commissioner*, 67 F. (2d) 726 (C. C. A. 7th), certiorari denied, 292 U. S. 637; *Insurance & Title Guarantee Co.* v. *Commissioner*, 36 F. (2d) 842 (C. C. A. 2d), certiorari denied, 281 U. S. 748.

debtedness to the taxpayer rose from $2,529,400 in 1930 to $4,848,000 in 1933 (3 R. 916). The loans were used by Prince for any purpose he desired.[9] Thus, Prince borrowed $160,000 from the taxpayer in 1932 for the purchase of a home in Newport, Rhode Island, and $450,000 in order to strengthen the financial statement of F. H. Prince & Co. which he was required to file with the New York Stock Exchange.[10] In 1933 he borrowed an additional $440,000 for the same purpose, and $1,000,000 to purchase stock in Armour & Co.[10] (3 R. 917.)

The taxpayer's failure to distribute its earnings during the years in question resulted in Prince's avoidance of large surtaxes during each of the years (3 R. 930–931).

In addition to its numerous subsidiary findings, the Board made three critical ultimate findings (3 R. 932):

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[9] Prince's relationship to the taxpayer is further illuminated by the fact that during the years 1930–1933 he transferred various securities to it, apparently unrelated to the stockyards enterprise, and thereby established losses which he deducted from his taxable income for those years (3 R. 928–929).

[10] The acquisition of the Armour stock enabled him to become chairman of its board of directors (3 R. 917). The practice had grown up during the years 1930–1932 among the packers whereby livestock would be shipped directly from the farmers to smaller stockyards and would then be conveyed by truck to the packing houses, thus avoiding the Chicago stockyards entirely. Prince's position as chairman of the board of directors of Armour made it possible for him to retain Armour's business for the Chicago stockyards. (3 R. 926.)

44. During the years 1930, 1932, and 1933 the petitioner was a mere holding or investment company.

45. During the years 1930, 1932, and 1933 the petitioner permitted its gains and profits to accumulate beyond the reasonable needs of its business.

46. During the years 1930, 1932, and 1933 the petitioner was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

These three separate findings formed the basis for its decision against the taxpayer on three independent grounds: (1) that since the taxpayer was a "mere holding company," the presumption set forth in Section 104 (b) was operative and that the evidence failed to rebut that presumption (3 R. 939); (2) that the accumulation of profits beyond the taxpayer's reasonable needs similarly brought the same presumption into play, and that the evidence, carefully reviewed on this aspect of the case (3 R. 940–945),[11] likewise failed to rebut

[11] On this aspect of the case, the Board determined that the taxpayer had no need for such accumulation of profits as a holding company (3 R. 940–941), and that it had no need for them as a management company or for the purpose of financing its affiliates (3 R. 941). And the Board finally determined that Prince's desire to buy out the various other stockholders in the Jersey Company by 1940, when its charter would expire, and to pay off all the bonded indebtedness of the entire Chicago Stockyards enterprise so that he might become its sole owner by 1940, was not, in the circumstances of this case, within the reasonable needs of the taxpayer's business (3 R. 942–945).

the presumption; and (3), that in any event, even without the benefit of the statutory presumptions, the record fully supports the ultimate determination that the taxpayer was "availed of" within the meaning of Section 104 (a) for the condemned purpose (3 R. 945–950).

The Circuit Court of Appeals reversed. It first rejected the Board's determination that the taxpayer was a "mere holding company," and treated the taxpayer as though it were, through Prince, an active corporation in the stockyards enterprise. The court thus ignored the Board's specific determinations that Prince's participation in the affairs of the Jersey Company, the Transit Company, and the Railway Company was as a paid employee of those companies and not as an officer of the taxpayer. Secondly, the court rejected the Board's second ultimate finding that the taxpayer's profits were permitted to accumulate beyond the reasonable needs of its business. In so doing, the court itself determined that the "liquidation" of the Jersey Company by 1940 was within the reasonable needs of the taxpayer's business, and it simply remanded the case to the Board for further findings as to the amount of profits that it was necessary to retain, for the projected "liquidation" of the Jersey Company and for the eventual extinguishment of all debts of the enterprise. Thirdly, the court rejected the Board's final finding that irrespective of the taxpayer's status as a "mere holding company" and irrespective of the character of the

accumulation, the corporation was in fact "availed of" in order to prevent the imposition of surtax upon its stockholders.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In overturning the determination of the Board of Tax Appeals that the respondent was a mere holding or investment company.

2. In overturning the Board's determination that respondent had accumulated its gains and profits beyond the reasonable needs of its business.

3. In overturning the Board's determination that respondent was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

4. In failing to accord the full effect to the presumption established by Section 104 (b).

5. In holding that the projected 1940 liquidation of the Jersey Company, coupled with the acquisition of sufficient Jersey common and preferred stock to be able to control the liquidation, was a reasonable need of the respondent's business.

6. In remanding the case upon a false issue.

7. In reversing the judgment of the Board.

REASONS FOR GRANTING THE WRIT

In reversing the decision of the Board, the court below improperly rejected three critical findings of fact, any one of which, standing alone, was suffi-

cient to support the Board's decision. We think that the action of the court below was such as to call for review by this Court. Cf. *Helvering* v. *National Grocery Co.*, 304 U. S. 282.

1. After making certain important subsidiary findings (3 R. 931), the Board specifically found that the taxpayer was a "mere holding company" (3 R. 932). Moreover, in its opinion, it indicated some of the considerations which led it to make that finding, and in particular it stated (3 R. 937, 938):

> The petitioner's income during the years 1930 to 1933 consisted exclusively of interest, dividends, and profits from the sale of securities. It received no fees for the management and supervision of other corporations. Its office was Prince's office at 1 Court Street, Boston, Massachusetts. An inspection of its income tax returns shows that it had practically no office expenses. It paid no rent except vault rent. It paid its president a salary of $50,000 per annum, its treasurer a salary of $500 per annum, and "wages" of $2,000 per annum. It paid no other salaries or wages. McDonough was Prince's secretary and was also vice president of the petitioner. He did not, however, receive any salary from the petitioner.
>
> * * * * *
>
> It is true, of course, that Prince supervised the operations of the Jersey Co. and all of its subsidiaries as well as of the subsidiaries of the petitioner. He was enabled to do this through ownership of all the stock of the petitioner, which had virtual control

through stock ownership of the other corporations. He was president of the Jersey Co., from which he received an annual salary of $17,500. He was also chairman of the board of directors of the Transit Co., from which he received a like salary, and chairman of the board of directors of the Railway Co., from which he received a salary of $12,499.92. He dictated the policies of the petitioner and of all of the other companies. It does not appear, however, that the petitioner supervised and managed the operations of its subsidiaries and those of the Jersey Co. and its subsidiaries. Prince did this himself. So far as appears, there were no meetings of the board of directors of the petitioner for the determination of any acts to be done by any of the companies. The returns of the Transit Co. and the Railway Co. report Prince as devoting 58 percent of his time to the affairs of the former and 42 percent to the latter. *When directing the affairs of those companies Prince was acting as a paid employee of those companies and not of the petitioner.* [Italics supplied.]

The court below, however, rejected the finding of the Board that the taxpayer was a "mere holding company." It stated: "We do not think that this is a permissible finding on the record, particularly in view of the subsidiary facts found by the Board" (4 R. 1285). The court then went on to find that, in its view of the record, the taxpayer was actively involved in the operation of the stockyards enter-

prise. It concluded that Prince's activities in the enterprise were to be attributed to the taxpayer, and in so doing it stressed one of the subsidiary findings of the Board that "representatives" of the taxpayer went to Chicago, giving orders and directions. However, it is perfectly plain from the Board's findings and its opinion, that it was referring to Prince (and possibly also to his assistant, McDonough), and that it regarded Prince's participation in the enterprise as being outside his capacity as an officer of the taxpayer. In finding otherwise, the court weighed the evidence and drew inferences from the facts. This it was not at liberty to do. *Wilmington Trust Co.* v. *Commissioner*, 316 U. S. 164; *Helvering* v. *National Grocery Co.*, *supra*. The finding of the Board in this case that the taxpayer was a "mere holding company" was just as much a finding of fact as its determination in the *Wilmington Trust Co.* case that a certain transaction was a "short sale". If the reviewing court had no authority to reject the finding in that case, there was similarly no authority to do so here. Cf. also *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37; *Helvering* v. *Lazarus & Co.*, 308 U. S. 252; *Helvering* v. *Kehoe*, 309 U. S. 277; *Colorado Bank* v. *Commissioner*, 305 U. S. 23. Moreover, on this phase of the case, the court did not appear to leave any room for further consideration by the Board upon remand as to whether the taxpayer was a "mere holding company", as it should have done if it were otherwise

correct in concluding that the Board's finding was not properly supported. *Helvering* v. *Rankin*, 295 U. S. 123, 131. The court itself had no power to make the ultimate determination. *Helvering* v. *National Grocery Co.*, 304 U. S. at 294–295.

2. An additional reason for review in connection with the court's rejection of the first critical finding, is its treatment of the presumption which that finding called into play. Section 104 (b) provides that "The fact that any corporation is a mere holding or investment company * * * shall be prima facie evidence of a purpose to escape the surtax." The court held that since the taxpayer has the burden of proving the Commissioner's determination erroneous in every tax case, the presumption established by Section 104 (b) "would seem not to amount to much." (4 R. 1285.) However, it is apparent that Congress was deeply concerned with avoidance of surtaxes through such corporations, and that it intended to cast a greater burden upon taxpayers in this type of case than is represented by the ordinary burden of going forward with the evidence. Otherwise, it would have been unnecessary to enact Section 104 (b). The issue is one of considerable importance because, if the decision is permitted to stand, it may erroneously influence the Board in its disposition of like cases, and its findings would obviously be such that the issue probably could never be

sharply raised in any of those cases by the Government in this Court. Accordingly, it is important that the question be considered now.

3. The Board's second critical finding rejected by the court below was that during the years in question the taxpayer "permitted its gains and profits to accumulate beyond the reasonable needs of its business." (3 R. 932.) The Board determined (3 R. 940-941) that the taxpayer had used its excess income to make additional investments and that this practice could not be regarded as within the reasonable needs of the business of a holding company. Even considered as a management company the Board concluded that the taxpayer had no need for the accumulation of so large a surplus (3 R. 941); that there was no need to accumulate profits for the purpose of financing other corporations (3 R. 941); that the taxpayer had used a large part of its profits in the purchase of the shares of stock in the Jersey Company (3 R. 942); that the next most important item consisted of loans made primarily to Prince (3 R. 942); that accumulations for the purpose of liquidating the Jersey Company in 1940 upon the expiration of its charter (including the acquisition of outstanding Jersey stock before that time and the accumulation of funds to pay off all bonds of Jersey and the taxpayer) were not within the reasonable needs of the business (3

R. 942–943); and that in view of the accumulations previously made there was no reasonable need for further accumulations during the taxable years (3 R. 943). Moreover, the Board expressly found that at the end of 1929 the taxpayer and its subsidiaries had over $19,000,000 available in liquid assets plus over $40,000,000 in fixed and other assets (3 R. 913–914), or a total of more than $60,000,000 in assets as against about $23,000,000 in bonded indebtedness (3 R. 913). By the end of 1933 the taxpayer's surplus had increased to over $28,000,000 (3 R. 919).

The court below reversed the ultimate finding of the Board. Its point of departure was that in its view, the "liquidation" of the Jersey Company by 1940 was within the reasonable needs of the taxpayer's business. Here again, its disagreement with the Board was upon a question of fact that the Board had determined after a most painstaking examination of the record. The remand to the Board upon this phase of the case leaves it to the Board to determine merely whether the accumulation was necessary for the liquidation of the Jersey Company and the eventual extinguishment of all the indebtedness of the enterprise, a false issue, for the Board had already found that the liquidation of the Jersey Company was not within the reasonable needs of the taxpayer's business.

4. Finally, the court below rejected the third critical finding of the Board that during the years involved (3 R. 932), the taxpayer "was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed." The Board had indicated that this ultimate finding could rest either upon the statutory presumption called into play by the first two critical findings, or upon the record itself without the benefit of the presumptions. The Board unambiguously stated (3 R. 945):

> Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932.

In rejecting this third finding, the court below simply substituted its judgment for that of the Board. The question is not whether the elements discussed by the court below would have justified

the Board in making a different finding; the essential consideration is that the Board did examine all the material before it and concluded as a matter of fact that the taxpayer had been "availed of" for the interdicted purpose. It was serious error to remand the case to the Board. *Helvering* v. *National Grocery Co.*, 304 U. S. at 295.

CONCLUSION

For the foregoing reasons, it is urged that this petition for certiorari be granted.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

OCTOBER 1942.

APPENDIX

Treasury Regulations 74 (promulgated under the Revenue Act of 1928):

ART. 541. TAXATION OF CORPORATION UTILIZED FOR EVASION OF SURTAX.—Section 104 is designed to discourage the formation or use of a corporation for the purpose of preventing the imposition of surtaxes upon its shareholders, through the device of permitting its gains and profits to accumulate instead of being distributed. If a domestic or foreign corporation is so formed or availed of, it is subject to a tax at the rate of 50 percent upon its net income in addition to the tax imposed by section 13. However, the additional tax at the rate of 50 percent does not apply for 1928 or any subsequent taxable year if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive share, whether distributed or not, of the net income of the corporation for such year or years. Any amount so included in the gross income of a shareholder shall be treated as a dividend received, and any subsequent distribution made by the corporation out of the earnings or profits for such taxable years shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included.

ART. 542. PURPOSE TO ESCAPE SURTAX.—Prima facie evidence of a purpose to escape the surtax exists where a corporation is a

mere investment company, where a corporation has practically no business except holding stocks, securities, or other property and collecting the income therefrom or investing therein, or where a corporation other than a mere holding or investment company permits its gains and profits to accumulate beyond the reasonable needs of the business. The statutory presumption that a mere holding or investment company is subject to the additional tax imposed by section 104 may be overcome if the corporation can show, either by reason of the fact that it distributed a large portion of its earnings for the year in question, or that its stock was held not by the members of a family or of a small group but by a large number of persons and in comparatively small blocks, or by other evidence, that it was not availed of for the purpose of preventing the imposition of the surtax upon its shareholders.

The business of a corporation is not merely that which it has previously carried on, but includes in general any line of business which it may legitimately undertake. However, a radical change of business when a considerable surplus has been accumulated may afford evidence of a purpose to escape the surtax. When one corporation owns the stock of another corporation in the same or a related line of business and in effect operates the other corporation, the business of the latter may be considered in substance the business of the first corporation. Gains and profits of the first corporation put into the second through the purchase of stock or otherwise may therefore, if a subsidiary relationship is established, constitute employment of the income in its own business. To establish that the business of one corpo-

ration can be regarded as including the business of another it is ordinarily essential that the first corporation own substantially all of the stock of the second. Investment by a corporation of its income in stock and securities of another corporation is not without anything further to be regarded as employment of the income in its business.

ART. 543. UNREASONABLE ACCUMULATION OF PROFITS.—An accumulation of gains and profits is unreasonable if it is not required for the purposes of the business, considering all the circumstances of the case. It is not intended, however, to prevent reasonable accumulations of surplus for the needs of the business. No attempt can be made to enumerate all the ways in which gains and profits of a corporation may be accumulated for the reasonable needs of the business. Distributions made by a corporation shortly after the close of its taxable year shall be taken into consideration in determining the reasonableness of the amount of earnings and profits of the corporation retained by it for such year. Undistributed income is properly accumulated if invested in increased inventories or additions to plant reasonably needed by the business. It is properly accumulated if retained for working capital required by the business or in accordance with contract obligations placed to the credit of a sinking fund for the purpose of retiring bonds issued by the corporation. In the case of a banking institution the business of which is to receive and loan money, using capital, surplus, and deposits for that purpose, undistributed income actually represented by loans or reasonably retained for future loans is not accumulated beyond the reasonable needs of the business.

The nature of the investment of gains and profits is immaterial if they are not in fact needed in the business. It is an unreasonable accumulation of gains and profits by corporations with the purpose of enabling their shareholders to escape surtaxes on such gains and profits which subjects such corporations to the additional tax imposed by section 104. Among other things, the financial condition of the corporation at the close of the taxable year and the manner in which its funds are invested at that date, determine the reasonableness of the accumulations.

For the purpose of section 104 the term "net income" means the net income of the corporation as defined in section 21 increased by the sum of (1) the amount received as dividends and allowed as a deduction by section 23 (p), plus (2) the amount of interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner. The Commissioner, or any collector upon direction from the Commissioner, may require any corporation to furnish a statement of its accumulated gains and profits, the name and address of, and number of shares held by, each of its shareholders, and the amounts that would be payable to each, if the income of the corporation were distributed. (See section 149 (c).)

The like numbered Articles of Treasury Regulations 77 (promulgated under the Revenue Act of 1932) are substantially identical with the foregoing.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1942

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO STOCK YARDS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions in the United States Board of Tax Appeals (III R. 932–956) are reported at 41 B. T. A. 590. The opinion of the Circuit Court of Appeals (IV R. 1265–1297) is reported at 129 F. 2d 937.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1942 (IV R. 1298). Petition for a writ of certiorari was filed in behalf of the

Commissioner of Internal Revenue on October 23, 1942 and was granted by this Court on December 7, 1942. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals improperly rejected findings of the United States Board of Tax Appeals (a) that during the taxable years in question the taxpayer was a mere holding or investment company, (b) that it permitted its gains and profits to accumulate beyond the reasonable needs of its business, and (c) that it was availed of for the purpose of preventing the imposition of surtaxes upon its shareholders, within the meaning of Section 104 of the Revenue Acts of 1928 and 1932.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 87–92.

STATEMENT

The central question is whether the taxpayer corporation, Chicago Stock Yards Company, was "availed of" during the years 1930, 1932, and 1933 for the purpose of preventing the imposition of surtaxes upon its stockholders by permitting its gains and profits to accumulate instead of being

distributed. The Commissioner determined that the taxpayer had been availed of for that purpose, and accordingly proposed to assess the 50% tax imposed by Section 104 of the Revenue Acts of 1928 and 1932 (I R: 27–34). The Board of Tax Appeals affirmed the Commissioner's determination, and approved the imposition of additional taxes for the years involved aggregating in excess of $4,000,000, plus interest (III R. 957–961, 1237–1239). The Board made extensive findings of fact (III R. 902–932, 957, 1202) which may be summarized as follows:

Chicago Stock Yards Company, a Maine corporation, referred to as the taxpayer, is the top holding company of what is sometimes called the Chicago stockyards enterprise. In addition to owning all of the stock of an operating utility company, Produce Terminal Corporation, as well as of other subsidiaries, the taxpayer controls the Chicago Junction Railways & Union Stock Yards Company, referred to as the Jersey Company, an intermediate holding company. The Jersey Company, in turn, owns all of the capital stock of several other operating companies, in which the great bulk of the stockyards enterprise is concentrated. (III R. 902–912.) Mr. Frederick H. Prince owns or controls all of the stock of the taxpayer (III R. 907–908, 909–910), and during the taxable years 1930, 1932, and 1933, avoided payment of surtaxes in excess of $1,300,000, because of the taxpayer's failure

to distribute its earnings (III R. 930–931).[1] See also footnote 4, *infra*, p. 7.

The Jersey Company and its subsidiaries.—The Jersey Company is a New Jersey corporation organized in 1890 for a period of fifty years (III R. 902). It has outstanding 65,000 shares of preferred stock and 65,000 shares of common stock, a share of each class being entitled to one vote. It also had outstanding $14,000,000 face value of non-callable bonds which were to mature in 1940.[2] The Jersey Company owns all of the capital stock (1) of the Union Stock Yards & Transit Company of Chicago, referred to as the Transit Company; (2) of the Chicago Junction Railway Company, referred to as the Railway Company; (3) of the Chicago Junction Railroad Company, referred to as the Elevated Company; and (4) all the shares of beneficial interest in the Central Manufacturing

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[1] In this connection, there is also a finding that the taxpayer's stockholders failed to report and pay taxes on their proportionate interests in the undistributed earnings pursuant to Section 104 (d) of the Revenue Acts of 1928 and 1932 (III R. 931); had that been done, the taxpayer corporation would not have been subject to the taxes here involved.

[2] Of these, $4,000,000 bore interest at 4% and $10,000,000 bore interest at 5%. The $10,000,000 5% bonds were issued in 1915 to retire an issue of like amount which matured in that year (III R. 903). As collateral security for these bonds, the Jersey Company pledged substantially all of the outstanding shares of the Transit Company and of the Railway Company, referred to above, and $2,500,000 face value bonds of another, unrelated company (III R. 911).

District, a real estate trust referred to as the District. (III R. 902, 903–905, 910.)

(1) The Transit Company, which was organized as an Illinois corporation in 1865, operates the Chicago stockyards. During the years 1911–1913 more than 98% of its capital stock was owned by the Jersey Company and since 1913 it has been wholly owned by that company. On January 1, 1930, the Transit Company had outstanding debenture notes in the amount of $500,000. These were retired in that year and it has since had no bond or note obligations outstanding. (III R. 902.)

(2) The Railway Company, an Illinois corporation organized in 1898, is the lessee at a rental of $600,000 a year of the "Inner Belt," a railroad line serving the stockyards, which is owned by the Transit Company. In 1922 the Transit Company and the Railway Company jointly sub-leased the "Inner Belt" to a subsidiary of the New York Central Railroad Company for 99 years at a rental, guaranteed by the New York Central, of $2,000,000 per annum after the first year, the sub-lessee to pay all maintenance charges and taxes. The Railway Company has no outstanding indebtedness. (III R. 903–904.)

(3) The Elevated Company, an Illinois corporation, owns an elevated passenger railroad serving the area in Chicago known as Packingtown. In 1903 the Elevated Company leased this property

to the South Side Elevated Railroad Company, which connects with lines running throughout Chicago. In 1905 the Elevated Company issued $2,327,000 first mortgage 4% bonds due March 1, 1945, which are guaranteed by the Jersey Company. The rental for the railroad line is the payment of taxes and interest on the Elevated Company bonds. (III R. 904–905.)

(4) The District, which is the real-estate trust referred to, was created in 1902 to hold and acquire vacant land for development into a manufacturing district in order to provide additional tonnage for the "Inner Belt." The District had outstanding bonds of $2,915,000 in 1930, $2,700,000 in 1931, $2,475,000 in 1932, and $2,250,000 in 1933. All of these bonds had been guaranteed by the Jersey Company. (III R. 905.)[2]

The Produce Terminal Corporation, referred to as the Produce Terminal, is an Illinois corporation which supplies electric light and power to the Chicago stockyards. In 1926 the Jersey Company distributed all of the capital stock of Produce Terminal to the taxpayer as a dividend and since that date it has been wholly owned by the taxpayer.

[2] In June 1931 the District became the owner of all the capital stock of the Central Storage Corporation and the Central Storage & Forwarding Corporation, the former of which was merged into the latter in December of that year (III R. 911). In addition, the Transit Company owns all the capital stock of the Stock Yards Harness & Saddlery Company (III R. 905). These subsidiaries have no outstanding obligations (III R. 913) and seem to be of minor importance.

Produce Terminal has no outstanding indebtedness. (III R. 905–906, 913.)

The taxpayer.—The taxpayer corporation was organized under the laws of Maine in 1911 for the purpose of acquiring an interest in the stock of the Jersey Company (III R. 902). From 1911 to June 1922 Prince was the owner of about four-fifths of the taxpayer's capital stock and Armour was the owner of the remaining one-fifth (III R. 907–908). In the latter year Prince acquired Armour's holdings and has since continued to own all of its capital stock (III R. 909–910).[4] Under the 1911 plan for the formation of the taxpayer corporation, the common stockholders of the Jersey Company were offered the alternative of the taxpayer's guaranty, by way of a stamp on their stock certifi-

[4] In June 1932, Prince transferred a substantial portion of this stock to F. H. Prince & Company, Inc., a corporation owned entirely by him, and then transferred the stock of the corporation to himself and his wife as trustees for the benefit of certain relatives and friends (III R. 910). The court below observed (IV R. 1269) that the 1932 change of stock ownership "is assumed by both parties to be immaterial to the present litigation." Prince, in the deed of trust, had reserved to himself the exclusive right to vote the shares of F. H. Prince & Company, Inc., and retained continuing control of the taxpayer (III R. 910, 945–946).

It may be noted that the surtaxes avoided by Prince, in excess of $1,300,000 (*supra*, p. 3), do not include the taxes which were also avoided by F. H. Prince & Company, Inc., and the trust with respect to the second half of 1932 and the entire year 1933 (III R. 948). According to the computation introduced at the hearing, the trust during these years avoided taxes aggregating $1,143,303.09. (II R. 853–854, Ex. YYYY.)

cates, of $9 annual dividends or the privilege of exchanging their shares at the rate of one share for $200 face value of fifty-year 5% collateral trust bonds of the taxpayer. Under this arrangement, the assenting stockholders, on their part, assigned to the taxpayer all their rights to dividends from the Jersey Company upon the guaranteed shares, taxpayer agreeing that all dividends on such shares should first be used to pay the 9% guaranteed dividends. The taxpayer also agreed to secure its 5% bonds by unstamped Jersey Company $100 common stock for each $200 face amount of bonds or by shares of Jersey Company $100 preferred stock for each $120 face amount of bonds. (III R. 906–907.)

By August 31, 1914, the taxpayer had acquired in exchange for its bonds 31,075 Jersey Company common shares, and 33,922 shares had been stamped with its guaranty. In 1919 the taxpayer acquired the three remaining shares. (III R. 908.) By December 31, 1929, the taxpayer had acquired 58,742 shares of the Jersey Company's common and 457 shares of its preferred (III R. 912). During the tax years here involved, 1930–1933, the taxpayer added to its holdings in the Jersey Company, owning, at the end of 1933, 60,336 shares of common and 2,362 shares of preferred.[*]

[*] Of these additions, taxpayer purchased 253 shares of common in 1930, 380 shares in 1932, and 357 shares in 1933; it purchased 190 shares of preferred in 1930, 302 shares in 1932, and 797 shares in 1933 (III R. 927–928). Despite its

Of the 60,336 shares of common held at the end of 1933, the taxpayer had acquired 31,310 shares in exchange for $6,262,000 par value of its 5% bonds, and the remaining 29,026 shares for $4,979,352.19 cash (III R. 927). The taxpayer's outstanding liability upon such bonds was $3,227,000 as of December 31, 1929 (III R. 913), and $2,620,000 as of December 31, 1933 (III R. 919–920). Maturing in 1961, these bonds are taxpayer's only fixed obligations (III R. 913, 919, 920).

The bypass agreement.—By an agreement dated October 1, 1914, the taxpayer guaranteed the payment of the expenses of the Jersey Company, including the interest, but not the principal, upon its $14,000,000 of bonds outstanding and any payments of interest, but not of principal, which might be required under Jersey's guarantee of the $2,327,000 bonds of the Elevated Company. The taxpayer also guaranteed 6% dividends on the Jersey Company preferred stock and 9% dividends on whatever common stock the taxpayer had not acquired. On its part, the Jersey Company assigned to the taxpayer its right to all dividends distributable by the Transit Company and the Railway Company, as well as its entire net income after taxes. However, it was agreed that the Jersey Company should direct the Transit Company and the Railway Company to pay certain

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large amount of cash on hand and the fact that they were readily procurable below par, the taxpayer purchased none of the bonds of the Jersey Company or the Elevated Company (III R. 924–927, 931).

specified amounts of interest on the Jersey Company bonds and dividends on its preferred stock and such common stock as the taxpayer had not acquired, and that the Jersey Company, in turn, should use its income first to pay its own expenses and taxes in each instance; any surplus was then to be paid to the taxpayer on its request. (III R. 908.)[7] The taxpayer has never been called upon to make any payments pursuant to its guarantees (III R. 931).

Other companies.—In addition to the wholly owned Produce Terminal, previously referred to (*supra*, p. 6), the taxpayer owns all of the capital stock of Western Associates, Inc., a Delaware corporation, organized in January 1933, to enable the taxpayer to hold stock in the Live Stock National Bank of Chicago (III R. 912). Apart from these subsidiaries, the taxpayer has had extensive dealings with F. H. Prince & Company, a brokerage and banking company wholly owned by Prince, with seats on the New York, Boston, and Chicago Stock Exchanges (III R. 908–909). Finally, the Pau Corporation, wholly owned by F. H. Prince & Company, was organized under Illinois law in 1931

[7] A copy of the agreement of October 1, 1914, is in the record as Exhibit 8-46. The exhibits are not printed but are certified to this Court in their original form.

This is true notwithstanding the fact that when the South Side Elevated Railroad Company, the lessee of the Elevated Company's line (*supra*, p. 6), went into receivership in 1932, the Jersey Company, as guarantor, paid the rental, which was used to pay the interest on the Elevated Company's bonds (III R. 930).

to take over the easements covering properties served with light and power by Produce Terminal. With money loaned to it by the taxpayer, upon which no interest was charged, the Pau Corporation also purchased machinery which was installed in the plant of Produce Terminal. (III R. 911–912.)

The structure of the Chicago stockyards enterprise on December 31, 1929.—Summarizing the situation at the threshold of the taxable years involved, the Board found that the taxpayer, upon a paid-in cash capital of $1,000,000, had an earned surplus of $19,615,905.69 and a capital surplus of $6,450. It owned all of the capital stock of Produce Terminal, carried at a value of $1,032,431.95, and of Central Manufacturing District Company,* carried at a cost of $506,448; 58,742 Jersey Company common shares out of 65,000 outstanding, carried at a cost of $10,993,551.74; and 457 Jersey Company preferred shares out of 65,000 outstanding, carried at a cost of $45,821.50. Produce Terminal was a prosperous corporation. It had net earnings of $262,213.73 for 1929 and annual average earnings of $172,517.68 for the five-year period ended with 1929. It paid dividends to the taxpayer from 1928 to 1933, inclusive, at the rate of $200,000 per annum. Its excess of assets over liabilities at Decem-

* This Company was organized pursuant to a plan for the purchase by Prince of Armour's shares in the taxpayer; it is of no present importance and is to be distinguished from the Central Manufacturing District, the real estate trust referred to above (III R. 909–910).

ber 31, 1929, was $2,352,017.05, although carried on the taxpayer's books at a value of $1,032,431.95. (III R. 912–913.) The taxpayer had outstanding at December 31, 1929, 5% bonds in the amount of $3,227,000. Its excess of assets over all liabilities, including its capital stock on that date, was $19,622,355.69. (III R. 913.)

The Jersey Company owned all the shares of capital stock of the Transit Company, the Railway Company, the Elevated Company, and the entire beneficial interest in the District. It filed a consolidated return for 1929, which included the operations of these wholly owned subsidiaries (including the operations of the Harness & Saddlery Company, a subsidiary of the Transit Company) and showed a net income of $2,835,383.71 for the entire group. The group had outstanding bonds and debenture notes as follows (III R. 913):

Jersey Co. 5% bonds maturing 4 1 40	$10,000,000
Jersey Co. 4% bonds maturing 4 1 40	4,000,000
Elevated 4½ bonds maturing 3 1 45	2,327,000
District bonds maturing at various dates	3,809,000
Transit Co. debenture notes maturing 1930	600,000
Total	20,736,000
Net consolidated assets	$73,322,871.58
Net consolidated liabilities	33,191,175.08
Excess of assets	40,131,696.50

Against the total bonded indebtedness of $23,963,000 standing against the entire group of companies (i. e., the $3,227,000 indebtedness of the taxpayer plus the $20,736,000 indebtedness of the Jersey Company and its subsidiaries), were the following liquid assets (III R. 914):

Taxpayer:	
Cash	$6,689,304.26
Accounts receivable	252,447.08
Notes receivable (Prince)	3,404,400.00
District 6's 1930	27,000.00
District 5's	55,733.40
Transit Co. 5½'s	15,022.50
Other investments	1,467,338.35
Produce Terminal:	
Cash	499,575.93
Total	12,410,821.12
Jersey Co. and subsidiaries*	9,594,363.94
Total	21,705,185.06

*Includes impounded charges of $2,013,523.54 which were not released to the Transit Co. until 1932.

In addition to the above, the taxpayer and the Jersey Company and its subsidiaries owned fixed and other assets of a book value of approximately $40,000,000 (III R. 914).

The taxpayer's balance sheets.—The taxpayer's balance sheets for the years 1929 to 1933, inclusive, revised to reflect correct earned surplus, are set out in full in the Board's findings (III R. 918–919). A comparison of the balance sheets as of December 31, 1929, and December 31, 1933, shows that the taxpayer's earned surplus increased from $19,615,905.69 to $28,259,278.70, as of December 31, 1933, or by $8,643,373.01.* Of the earned surplus at the

*The Board pointed out that an item carried in the balance sheets as "Investment Account"—$7,000,000—had never had any asset value, but represented the capital stock issued for the 1911 plan (III R. 919–920). This item is offset by the capital stock, carried at $8,000,000, of which only $1,000,000 was issued for cash. In addition, the Board referred to other items which disclosed an actual earned surplus substantially in excess of that reported on the balance sheets (III R. 920).

end of 1933, $7,645,235.97 was in cash and represented an increase in cash over 1929 of $955,931.71, not taking into consideration certain subordinated bank deposits, hereafter referred to, in the amount of $1,800,000. (III R. 918–919.)

The taxpayer's income.—The taxpayer's net earnings and dividends paid for the years 1911–1933 are shown in the following tabulation (III R. 918):

Year	Net earnings	Dividends paid	Excess of net earnings
	$	$	$
1911–1929	24,375,905.69	4,760,000	19,615,905.69
1930	3,468,336.80	400,000	3,068,336.80
1931	2,338,232.14	400,000	1,938,232.14
1932	2,172,963.09	400,000	1,772,963.09
1933	2,243,840.98	400,000	1,843,840.98
Totals	34,619,278.70	6,360,000	28,259,278.70

As shown by this table, the taxpayer's net earnings for the four years, 1930–1933, were $10,243,373.01. Of these earnings, $1,600,000 was paid out in dividends and $8,643,373 is reflected in earned surplus. Of the latter sum, $8,069,074.36 represents an increase in assets, and $574,298.65 a reduction of liabilities. (III R. 919.)

Income and financial condition of the enterprise, 1930–1933.—The Board also found, in tabular form, the net earnings of the entire enterprise during the years 1930–1933, inclusive, as well as the separate earnings of the Jersey Company, its subsidiaries and Produce Terminal (III R. 921–924). As of December 31, 1930, and December 31, 1933, the

earned surpluses of these companies were as follows (III R. 922–924):

	1930	1933
Jersey Company	$8,062,693.22	$4,203,805.76
Transit Company	5,019,956.05	3,718,951.06
Railway Company	2,073,881.72	2,425,521.83
Elevated Company	*57,361.55	*134,635.97
District	5,126,553.50	5,699,978.65
Produce Terminal	1,039,253.66	1,182,516.98

* Deficit.

Use made by taxpayer of its funds, 1930–1933.— During these years the taxpayer, apart from disbursing dividends in the aggregate amount of $1,600,000, reduced its liabilities by $574,298.65 (*supra*, p. 14); added to its cash on hand $2,755,931.71, $1,800,000 of which was subordinated to the claims of other depositors in a stockyards bank;[10] loaned to the District $1,625,000 to enable it to pay off some of its bonds and improve its properties; increased its loans to Prince, which are hereinafter referred to, in the amount of $1,743,600; loaned $236,536.51 to the Pau Corporation (wholly owned by Prince), without interest; invested $1,500,000 in the shares of Western Associates, Inc. (*supra*, p. 10); spent $245,800.45 for 1,594 shares of common and $173,111.83 for 1,905 shares of preferred stock of the Jersey Company (*supra*, p. 8); spent $423,107.25 in the purchase of $609,000 par value of its 5% bonds, maturing in 1961; and various

[10] During this same period the Transit Company, Produce Terminal, and the District subordinated deposits of $2,200,000 in order to assist stockyards banks (III R. 915).

amounts in the purchase of other securities (III R. 927, 940). The taxpayer also invested $3,573,218.77 in securities of stockyards banks [11] which needed bolstering (III R. 915). With respect to the advances to the District and the Pau Corporation, the Board found that the necessity for these loans, if any existed, was not shown (III R. 942). With respect to the loans to Prince, the Board found that there was no satisfactory explanation as to why the taxpayer did not make dividend distributions to Prince of the funds which he needed (III R. 947). And concerning the taxpayer's general use of its funds, the Board also expressly found that taxpayer was free to use them in any manner it saw fit [12] (III R. 941–942).

Prince's indebtedness to the taxpayer.—At the end of each year from 1911 to 1933, inclusive,

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[11] During these same years the Transit Company and Produce Terminal invested some $3,750,000 in such securities (III R. 914–915).

[12] While some of the statements contained in the above and succeeding paragraphs are taken from determinations of fact appearing in the body of the Board's opinion which are not separately denominated as "findings," it is settled that they are nonetheless findings and are to be treated as such. *Baker* v. *Commissioner*, 115 F. 2d 987 (C. C. A. 6th); *Shippaid & Myers, Inc.* v. *Commissioner*, 45 F. 2d 50 (C. C. A. 3d), certiorari denied, 282 U. S. 902; *Emerald Oil Co.* v. *Commissioner*, 72 F. 2d 681 (C. C. A. 10th); *American Textile Woolen Co.* v. *Commissioner*, 68 F. 2d 820 (C. C. A. 6th), certiorari denied, 293 U. S. 558; *Olson* v. *Commissioner*, 67 F. 2d 726 (C. C. A. 7th), certiorari denied, 292 U. S. 637; *Insurance & Title Guarantee Co.* v. *Commissioner*, 58 F. 2d 842 (C. C. A. 2d), certiorari denied, 281 U. S. 748.

Prince or his wholly owned brokerage house, F. H. Prince & Company,[13] was indebted to the taxpayer (III R. 915–916). At the end of 1911 the debt amounted to $300,000; it steadily increased up to 1921, reaching $760,000. The loans, both of cash and securities, by the taxpayer to Prince or F. H. Prince & Company at the end of each year from 1922 to 1933, inclusive, were as follows (III R. 916):

Year	Cash	Securities	
		Bonds Taxpayer and United States Treasury	Stock New Jersey Company Common Shares
1922	$760,000 00	$150,000	16,855
1923	785,000 00	160,500	16,855
1924	780,000 00	164,000	15,355
1925	760,000 00	172,000	15,365
1926	947,867 08	172,000	14,755
1927	1,080,000 00	150,000	13,000
1928	1,700,000 00	80,000	11,000
1929	3,104,400 00	170,000	6,000
1930	2,520,400 00	150,000	4,200
1931	2,519,400 00	241,000	3,400
1932	3,408,000 00	91,000	1,710
1933	4,848,000 00	45,000	1,800

Prince and the brokerage company paid interest on cash borrowed from the taxpayer at the rate of 4% per annum, but nothing for the securities bor-

[13] In connection with these loans the Board did not distinguish between Prince and F. H. Prince & Company (III R. 915, fn. 3). The latter was wholly owned by Prince, its business was reported in his individual tax return, and for purposes of the present case the two are "identical" (I R. 106–107). F. H. Prince & Company is to be distinguished from the *corporation* F. H. Prince & Company, Inc., referred to in footnote 4, *supra*, p. 7.

rowed. From 1912 to 1933 collateral was pledged with the taxpayer to secure the cash loans, consisting principally of the taxpayer's common stock. The fair market value of the collateral so pledged was $3,673,608 at the end of 1930, $5,541,695.20 at the end of 1932, and $8,664,199 at the end of 1933. (III R. 916–917.)

These loans were used by Prince for any purpose desired by him. In 1932 Prince borrowed $160,000 from the taxpayer for the purchase of a home at Newport, Rhode Island, and $450,000 in order to strengthen the financial statement of F. H. Prince & Company. In 1933 he borrowed an additional $440,000 for the same purpose and $1,000,000 to enable him to acquire stock in Armour & Company. The latter loan enabled Prince to become chairman of the board of directors of Armour & Company and thus to retain its business for the Chicago stockyards. (III R. 917, 926.)[14]

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[14] The taxpayer's status as a vehicle for tax avoidance is further illuminated by the fact that during the years 1931–1933 F. H. Prince & Company "sold" various securities to it, most of them apparently unrelated to the stockyards enterprise, and thereby enabled Prince to establish losses in substantial amounts which he deducted from his taxable income for those years. Those deductions amounted to $196,124.68 in 1931, $221,629.08 in 1932, and $93,102.22 in 1933. (III R. 928, 929.) Moreover, in 1932 the taxpayer sold to F. H. Prince & Company, Inc., 3,050 shares of the Chicago Stock Yards National Bank and 240 shares of Central Manufacturing District Bank at a loss to the taxpayer of $221,202.03 (III R. 929).

The Board also refers to another use made of the taxpayer by Prince resulting in a reduction of his own tax

The taxpayer's principal activity.—The taxpayer's income during the years 1930–1933 consisted exclusively of interest, dividends, and profit upon sales of securities. Its tax returns for these years described its business as that of "acquiring and guaranteeing securities." It received no fees for the management and supervision of any of its subsidiaries. It had practically no office expenses; it paid no rent except vault rent; and its office was Prince's office at 1 Court Street, Boston. The taxpayer paid its treasurer a salary of $500 and "wages" of $2,000 a year. Apart from the $50,000 salary which it paid its president, Prince, the taxpayer paid no other salaries or wages. McDonough, its vice president [18a] and Prince's secretary, did not receive any salary from the taxpayer. (III R. 922, 937.) During the years 1930–1933, and prior to that period, the taxpayer's principal activity was the purchase and holding of securities, the collecting of dividends, and the lending of money to Prince (III R. 931).

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liabilities. Over a period of several years F. H. Prince & Company had accumulated approximately 18,000 shares of Jersey Company common, upon which it was receiving an annual dividend of $9 per share. These shares belonged to F. H. Prince & Company, and hence to Prince individually, and were not purchased for the account of the taxpayer. In 1918 the shares were transferred to the taxpayer at cost. This transaction relieved Prince of the payment of surtaxes upon the dividends received from these shares. (III R. 927, 947.)

[18a] McDonough, in fact, did not become vice president of the taxpayer until after the taxable years here involved (*infra*, p. 55).

In addition to his salary from the taxpayer, Prince received the following annual salaries from the taxpayer's subsidiaries in the capacities indicated below (III R. 929):

President of the Jersey Co.	$17,500.00
Chairman of the board of directors of the Transit Co.	17,500.08
Chairman of the board of directors of the Railway Co.	12,499.92

The returns of the Transit Company and the Railway Company reported Prince as devoting 58% of his time to the former and 42% to the latter (III R. 938). Although Prince actively supervised the operations of the Jersey Company and its subsidiaries as well as the subsidiaries of the taxpayer, he was enabled to do so through his ownership of all of the taxpayer's stock. In directing the affairs of these companies (III R. 929–930) he was acting as a paid officer or employee of these companies and not of the taxpayer (III R. 938).

In addition to its numerous subsidiary findings, the Board made three critical ultimate findings (III R. 932):

> 44. During the years 1930, 1932, and 1933 the petitioner was a mere holding or investment company.
>
> 45. During the years 1930, 1932, and 1933 the petitioner permitted its gains and profits to accumulate beyond the reasonable needs of its business.
>
> 46. During the years 1930, 1932, and 1933 the petitioner was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

These three separate findings form the basis of the Board's decision against the taxpayer on three independent grounds: (1) Since the taxpayer was a "mere holding or investment company," the presumption set forth in Section 104 (b) was operative and the evidence failed to rebut that presumption; (2) the accumulation of earnings beyond the taxpayer's reasonable needs similarly brought the same presumption into play and the evidence here likewise failed to rebut the presumption; and (3) in any event, even without the benefit of the statutory presumptions, the record establishes that the taxpayer was "availed of" within the meaning of Section 104 (a) for the condemned purpose (III R. 945).

Reversing the decision of the Board, the Circuit Court of Appeals rejected as without support in the evidence the Board's determination that the taxpayer was a "mere holding company" (IV R. 1285). Secondly, the court rejected the Board's finding that the taxpayer's earnings were permitted to accumulate beyond the reasonable needs of its business, on the ground that the Board had used an improper "legal yardstick" in measuring such needs (IV R. 1290). Thirdly, the court rejected the Board's final determination, which was reached without the aid of the presumptions, on the ground that it rested "chiefly" on the Board's findings under the first and second points (IV R. 1296).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In overturning the determination of the Board of Tax Appeals that the taxpayer was a mere holding or investment company.

2. In overturning the Board's determination that the taxpayer had accumulated its gains and profits beyond the reasonable needs of its business.

3. In overturning the Board's determination that the taxpayer was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

4. In failing to accord the full effect to the presumption established by Section 104 (b) of the Revenue Acts of 1928 and 1932.

5. In holding that the projected 1940 liquidation of the Jersey Company, coupled with the acquisition of sufficient Jersey Company common and preferred stock to be able to control the liquidation, was a reasonable need of the taxpayer's business.

6. In remanding the case upon a false issue.

7. In reversing the judgment of the Board.

SUMMARY OF ARGUMENT

I

The Board rejected the taxpayer's claim that it supervised and directed the entire stockyards enterprise and acted as "banker" for it. Appraising

the evidence, the Board found instead that the taxpayer had merely an investment interest in the enterprise, and that its funds, rather than being dedicated to the requirements of the Jersey Company and the operating companies, were commanded by Prince in the accumulation of a vast personal fortune. The Circuit Court of Appeals overturned the Board's findings as not "permissible", and found for itself that the taxpayer did supervise and direct the enterprise and did act as banker for it. This conclusion the court reached only by appraising the evidence for itself, picking and choosing from among bits of evidence which pointed in opposite directions, and by tearing from their context certain of the Board's subsidiary findings. This the court was not at liberty to do.

On the basis of its subsidiary findings, the Board made the ultimate finding that the taxpayer was "a mere holding or investment company" within the meaning of Section 104 (b). That finding of the Board was just as much a finding of fact as its determination in *Wilmington Trust Co.* v. *Commissioner*, 316 U. S. 164, that a certain transaction was not a "short sale." If the reviewing court had no authority to reject the finding in that case, there was similarly no authority to do so here. And since the Board found that the presumption which was called into play by that finding had not been overcome by the evidence adduced in behalf of the taxpayer, this was enough to dispose of the case.

II

In the alternative, the Board found that even if the taxpayer were not a mere holding or investment company, the Commissioner's determination was correct. For, the Board concluded that, even considering the taxpayer as a management company in the stockyards enterprise, the earnings had been accumulated beyond the reasonable needs of the taxpayer's business within the meaning of Section 104 (b). In support of that finding the Board noted, *inter alia*, that the taxpayer's accumulated profits as of December 31, 1929, amounted to some $20,000,000 and were more than ample to provide for the retirement of its outstanding bonds, aggregating $3,227,000 and maturing in 1961, and any contingent liability under its guaranty of certain payments connected with the Jersey Company. The Board concluded that the taxpayer's evidence failed to overcome the presumption brought into play by the foregoing finding that its earnings had been accumulated beyond the reasonable needs of its business.

In overturning this ultimate finding the court professed to base its ruling on the ground that the Board had used an erroneous "legal yardstick" in determining the taxpayer's business needs. The Jersey Company's charter was to expire in 1940, and the taxpayer asserted in substance that it intended to use the accumulated earnings to buy out the "minority" interests and "liquidate" the

Jersey Company in 1940. The Board had ruled that such a purpose was merely in furtherance of Prince's plans to obtain complete ownership of the stockyards enterprise, and did not represent reasonable business needs. In deciding otherwise, the court below really differed with the Board on a question of fact. It should not have remanded the case for further proceedings to determine whether the accumulations were necessary for the so-called liquidation of the Jersey Company. The issue left open on the remand is a false one, for the Board had already determined that the "liquidation" of the Jersey Company was not within the reasonable needs of the business.

III

Finally, the Board considered the evidence without the aid of the statutory presumptions discussed above in Points I and II, and, so appraising the evidence, made its third critical finding that the taxpayer had been "availed of" to avoid surtaxes on its shareholders within the meaning of Section 104 (a). The court below rather lightly put aside this finding, stating that it "was predicated chiefly" upon the two findings discussed above in Points I and II, which the court had already rejected.

But the court was seriously mistaken in thus treating this third ultimate finding, for the Board had explicitly stated that it was reached without

the benefit of the statutory presumptions brought into play by the other two findings, and had outlined the dominant considerations which led it to make this third ultimate finding, saying (III R. 945):

> Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932.

Accordingly, unless the Board is to be disbelieved, it actually placed its decision upon this third independent alternative ground. The finding upon which that ground rested was amply supported by the record, and should not have been disturbed on appeal.

ARGUMENT

This case involves Section 104 of the Revenue Acts of 1928 and 1932. The sections are identical except as subdivision (a) of Section 104 of the 1932 Act was amended in a respect unimportant for

present purposes by Section 214 of the National Industrial Recovery Act (Appendix, *infra*, pp. 87–88). Subdivision (a) of Section 104 of both Acts lays a 50% tax upon the "net income" of any corporation which is—

> formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed * * *.

Subdivision (b) provides that the fact that any corporation is a mere holding or investment company or that its gains or profits are permitted to accumulate beyond the reasonable needs of the business "shall be prima facie evidence of a purpose to escape the surtax." Subdivision (c) defines the "net income" upon which the tax is measured, and subdivision (d) provides that the tax shall not apply if all of the shareholders of the corporation include in their gross income their entire distributive shares of the net income of the corporation, whether distributed or not.

The tax imposed by these sections [15] is dependent upon the "purpose" of those in a position to control the corporation. In this respect, the tax imposed by Section 104 differs from the tax imposed upon the undistributed profits of personal holding

[15] Comparable provisions have been in every revenue act since the adoption of the Sixteenth Amendment. The first such provisions appeared in Section II A, Subdivision 2 of the Tariff Act of 1913, c. 16, 38 Stat. 114, 166.

companies by Section 351 of the Revenue Act of 1934, c. 277, 48 Stat. 680 (see *Noteman* v. *Welch*, 108 F. 2d 206 (C. C. A. 1st)), and the tax imposed upon the undistributed profits of corporations generally, other than personal holding companies, by Section 14 of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (see *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46). It should be observed, however, that in imposing the taxes upon undistributed profits without regard to purpose in the Revenue Acts of 1934 and 1936, Congress did not abandon the tax involved in the instant case. Instead, it continued and strengthened it. By Section 102 of the Revenue Act of 1938, c. 289, 52 Stat. 447, the fact that the earnings of a corporation are permitted to accumulate beyond the reasonable needs of the business is made—

> determinative of the purpose to avoid surtax upon shareholders unless the corporation by the clear preponderance of the evidence shall prove to the contrary.[18]

As amended in this and other respects, the tax here involved has been carried into the Internal Rev-

[18] It appears that the 1938 amendment would have had no effect on the instant case since here the Board of Tax Appeals determined that the taxpayer failed to rebut the presumption arising from its unreasonable accumulation of earnings even by a bare preponderance of the evidence; and if the presumption itself has been properly established, the question whether it has been overcome, as we point out, *infra*, p. 35, is a matter for the trier of fact which the reviewing court is powerless to disturb.

enue Code, Section 102 (U. S. C., Title 26, Sec. 102).

Since the tax depends upon purpose or motive, the application of Section 104 turns upon the state of mind of the person or persons in control of the corporation. This, of course, is not novel, for both at common law and under statutes liability not infrequently depends upon a person's mental state. *Helvering* v. *Nat. Grocery Co.*, 304 U. S. 282, 289–290, rehearing denied, 305 U. S. 669; *United Business Corp.* v. *Commissioner*, 62 F. 2d 754, 756 (C. C. A. 2d), certiorari denied, 290 U. S. 635. As in other fields of the law involving a subjective state, the trier of fact is not required to accept at face value the denials of the person whose purpose or motive is in issue, but may base its ultimate determination upon circumstantial evidence of rational probative force. *Helvering* v. *Nat. Grocery Co.*, 304 U. S. at p. 295. Thus, in cases such as this, it becomes highly relevant to investigate the scope and character of the corporation's business, to inquire whether profits have been accumulated in excess of the reasonable needs of the business, and to examine all pertinent transactions between the corporation and its stockholders.

Plainly, such questions as the scope and character of the taxpayer corporation's activities, its reasonable business needs, its dealings with its stockholders, and the ultimate determination

of the existence of the forbidden purpose are pure questions of fact for the Board or trial court to decide. If the findings of the trier of fact are supported by substantial evidence, and are untainted by errors of law, they are conclusive upon review. *Helvering* v. *Nat. Grocery Co.*, *supra*; *Wilmington Trust Co.* v *Commissioner*, 316 U. S. 164; *Helvering* v. *Kehoe*, 309 U. S. 277; *Helvering* v. *Lazarus & Co.*, 308 U. S. 252; *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37; *Helvering* v. *Rankin*, 295 U. S. 123. It is of no moment that there may be substantial evidence to support a finding contrary to that made by the Board or trial court. As this Court has recently said, referring to findings made by the National Labor Relations Board, "The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the Board from drawing one of them * * *." *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105, 106. The court below, while nominally deferring to these well-settled principles, in fact seriously departed from them in its review of the Board's findings in the instant case.

The operation of the presumptions.—We think, at the outset, there are two other preliminary points which should be considered. Subdivision (b) provides that the fact that a corporation is a mere holding or investment company or that its gains or profits are permitted to accumulate beyond the reasonable needs of the business "shall be prima facie evidence of a purpose to escape the

surtax." The court below thought that these presumptions[17] were of no moment since the taxpayer in any event had the burden of proof in every tax case by virtue of the presumption of correctness attaching to the Commissioner's determination and its position as petitioner in the proceedings before the Board (IV R. 1284–1285). The court made the rather inexplicable statement that "so far as the presumption is concerned, § 104 (b) would seem not to amount to much" (IV R. 1285). Under this view subdivision (b) adds nothing—a result inconsistent with the familiar rule that, if possible, significance shall be accorded every word of a statute. *Ex parte Public Bank*, 278 U. S. 101, 104; *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.

To be sure, there is a presumption of correctness that attaches to the Commissioner's determination in the ordinary tax case,[18] and the taxpayer, as the moving party before the Board of Tax Appeals normally has the burden of proof. But these factors throw no light on the scope of the issues in

[17] They were so referred to by Mr. Justice Brandeis in the *National Grocery* case, 304 U. S. at p. 294, and we accordingly adopt that terminology. In the present context, however, the expression "presumption" adds very little, for the effect to be accorded presumptions varies with the reasons of policy which bring them into play. See, e. g., Morgan, *Some Observations Concerning Presumptions*, 44 Harv. L. Rev. 906, 912–914, 931–932 (1931).

[18] See *Wickwire* v. *Reinecke*, 275 U. S. 101, 105; *Welch* v. *Helvering*, 290 U. S. 111, 115; *J. M. Perry & Co.* v. *Commissioner*, 120 F. 2d 123, 124 (C. C. A. 9th); *Helvering* v. *Talbott's Estate*, 116 F. 2d 160, 162 (C. C. A. 4th).

controversy or the significance to be accorded particular evidence. It is in this connection that important effect may, and we think plainly should, be given Section 104 (b). Congress has recognized that proof of "purpose" might become difficult by reason of its subjective character; it has therefore sought to afford ease of proof of taxability by singling out two of the many subsidiary facts which may be developed in cases of this kind and requiring that very special weight should be given them. Although the ultimate point of inquiry remains whether the corporation has been formed or availed of to avoid surtaxes on its shareholders, Congress has undertaken to give guidance and direction to that inquiry and has in effect stated that the tax shall be imposed when the facts giving rise to the presumption have been established, unless the Board is satisfied that the condemned purpose was absent.

Nor is it an answer to the effectiveness of the presumptions to say, as did the court below (IV R. 1285, 1289), that they have a "logical core" apart from Section 104 (b).[18] In the absence of the presumptions it might plausibly be argued that the fact that the corporation is a mere holding or investment company or that its profits have been permitted to accumulate beyond the reasonable needs of its business in itself proves nothing, since,

[18] It is not essential, of course, that presumptions have logical bases and some, such as the presumption of survivorship among the victims of a common disaster, do not.

quite apart from tax considerations or even the existence of an income tax law, the shareholders might see no advantage in accumulating such profits in their individual bank accounts rather than in the corporation's bank accounts. By the adoption of the presumptions, Congress has foreclosed any such contention. It has in substance declared that the proper operation of the revenue laws—individual income being taxed at more steeply graduated rates than corporation income—requires the assumption that, except as reasonably needed for the operation of its business, a corporation normally pays out its earnings in dividends to its shareholders. Consequently, in the judgment of Congress, a finding that this has not been done provides a sufficient basis for the tax imposed by Section 104.

Moreover, the contrasting provisions of the two presumptions clearly indicate that in referring to "the reasonable needs of the business," in the second presumption, the statute means the reasonable needs of an active enterprise, engaged in the production of goods or the rendering of services, as distinguished from the "business" of merely holding or investing in the underlying shares of an enterprise. This is shown by the fact that the latter type of corporation is separately dealt with in the first presumption, and that, as to such corporations, the existence of *any* surplus is sufficient to erect the presumption. It is also shown by the 1924

amendment to the provision corresponding to Section 104 in the Revenue Act of 1921 and the earlier revenue acts. Section 220 of the Revenue Act of 1921, c. 136, 42 Stat. 227, had limited the first presumption to the case of "a mere holding company." Under this language the Treasury was confronted with the argument that an investment company, whose "business" it was to invest its net income, fell outside the holding company presumption, and could justify an accumulation to satisfy its investment requirements. To meet this contention, Section 220 of the Revenue Act of 1924, c. 234, 43 Stat. 253, extended the presumption to include a mere holding "or investment company." See H. Rep. No. 179, 68th Cong., 1st Sess., p. 22 (1939–1 Cum. Bull. (Part 2) 257); S. Rep. No. 398, 68th Cong., 1st Sess., p. 26 (1939–1 Cum. Bull. (Part 2) 284); Cong. Record, Vol. 65, Part 7, pp. 7354–7355.

The presumptions so established are, of course, not conclusive; the taxpayer may be able to overcome them. Even here, however, the facts underlying the presumptions narrow the type of countervailing evidence which may be considered. Proof of an investment purpose, for example, will obviously not suffice, for the existence of an investment company in itself gives rise to a presumption of the forbidden purpose. Furthermore—and here the court below did not express disagreement—by the force of Section 104 (b) the trier of fact, as indicated is authorized and indeed required to infer

from the facts underlying both or either presumption the existence of the condemned purpose unless he is persuaded by the taxpayer's further evidence that the purpose is absent. As applied to the reviewing court, the effect of the presumptions would appear to be even more decisive. When the Board or trial court has found against the taxpayer on the basis of one or both presumptions and the findings upon which the presumptions rest are supported by substantial evidence, the review is ended. It is no part of the function of the reviewing court to determine whether the presumption is displaced. *J. M. Perry & Co.* v. *Commissioner,* 120 F. 2d at p. 125; see *United Block Co.* v. *Helvering,* 123 F. 2d 704 (C. C. A. 2d), certiorari denied, 315 U. S. 812. For, to enter this field would require an appraisal and weighing of the countervailing evidence—a role not open to the appellate court.

In these circumstances, it seems patently erroneous to conclude, as did the court below, that the presumptions of Section 104 (b) add nothing to the statute. It is difficult to say to what extent such views colored its consideration of the case.[20] No doubt they had some effect, and to the extent that the court believed a mere investment program

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[20] It is true, of course, that the presumptions are no more than tools, and that an ultimate finding of the forbidden purpose may be warranted although neither presumption is established. *United Business Corp.* v. *Commissioner,* 62 F. 2d at p. 755; *United States* v. *R. C. Tway Coal Sales Co.,* 75 F. 2d 336, 337 (C. C. A. 6th).

in an active enterprise to be inconsistent with the purposes of tax avoidance, these views may account for its disposition of the case. If uncorrected, moreover, they are calculated in other instances to work damage in the consideration given this type of case by the Board and the district courts. And errors of this kind, when intermingled with the fact-finding function, may be impossible to isolate and correct on review.

The fact that the taxpayer corporation has a single dominant shareholder.—Since a single individual, Prince, owned, for all practical purposes, the taxpayer's entire capital stock, we have here an example of that "domination and control * * * so obvious in a wholly owned corporation." *Higgins* v. *Smith*, 308 U. S. 473, 476. And see *Griffiths* v. *Commissioner*, 308 U. S. 355, 357–358. The Board's opinion accordingly referred to the taxpayer as "the *alter ego* of Prince," or as "Prince in corporate clothes" (III R. 946), as plainly was the case. The Circuit Court of Appeals expressed considerable impatience with this approach. It asserted that this "does not advance the argument much" (IV R. 1288), and insisted that (IV R. 1291–1292):

> The corporate needs must be judged from the standpoint of the corporation doing business as a legal entity separate and distinct from its shareholders. It is hardly fair to argue as the Board does: "It was of no mo-

> ment to Prince whether the earnings of the petitioner were carried in his individual pocketbook or in his corporate pocketbook, except that if they had been received in the first instance in his individual pocketbook or distributed to him by the petitioner, he would have been subjected to heavy surtaxes upon them, while he avoided such surtaxes by retaining them in the corporation." Prince is mortal; petitioner is endowed with at least potential immortality. A corporation would not be providing adequately for its own needs and legal commitments if it paid out all of its earnings in dividends and relied upon its stockholders coming to its rescue as the need arose.[21]

Apparently referring to the second presumption, the court seemed to recognize that there "is a necessary distinction * * * between the corporation's reasonable business needs and the personal ambitions of Prince, its sole stockholder," but said that this was "difficult to draw in a case like the present" (IV R. 1293).[22]

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[21] The sentence quoted by the court is from the Board's opinion at III R. 946.

[22] Elsewhere in the opinion, however, the court seems to adopt a contrary approach, urging that the supervisory activities of Prince as an individual must be imputed to the taxpayer (IV R. 1288). We think the court overlooked the fact that while the taxpayer could act only through Prince, Prince could act other than through the taxpayer. To Prince, the taxpayer was only one of the several devices at his command. (See *infra*, pp. 50–51.)

The court below, we submit, has interwoven the unsound and the sound approach to problems of this character. Realistically, the taxpayer could have no purpose other than that which Prince imputed to it (see *United Business Corp.* v. *Commissioner*, 62 F. 2d at p. 756), and Prince's worth was increased equally whether the taxpayer added to its earned surplus or Prince added to his bank account. To blind ourselves to these facts provides no solution for this type of case, and Section 104 requires no such gingerly treatment of the corporate fiction as that indulged by the court. On the other hand, for the sake of appraising the "business needs" of a corporation under Section 104, there is a severe limitation upon the purpose which may be imputed to the corporate entity by its shareholders. Apart from the statute, an individual no doubt can impute to his corporation the declared purpose of making him a millionaire by using its earnings for the purchase of all the stock of an enterprise; but he cannot raise any such program to the dignity of a corporate purpose within the scope of Section 104.

The weight to be attributed to the fact that all the corporation's shares are held by a single individual is indicated by the principle underlying Section 104 (b) and the decision of this Court in the *National Grocery* case, *supra*. Where the corporation is engaged in an active business, entailing the production of goods or the rendering of serv-

ices, and its accumulated profits do not exceed the amount normally required for working capital, no inference of the forbidden purpose can properly be drawn from the mere existence of a surplus. While even here the sole stockholder would be no worse off if he received the income of the corporation directly and paid the expenses of the business from funds in his own hands, an inference arises from the existence of a going business that the funds which it produces are dedicated to its continuance. In the case of a business corporation whose shares are widely held, the amount of the accumulation may be sufficient even to provide for a moderate expansion of its facilities or the payment of outstanding obligations incurred for capital investment before any inference of the forbidden purpose arises; for in such a case it may be impracticable to rely upon many different stockholders individually to accumulate the funds upon which the business may wish to draw, and the fact that the shareholders are numerous diminishes the force of the contrary inference that the accumulation is made to serve the selfish purpose of a few. In this situation, otherwise expressed, there are still practical reasons for believing that the accumulations are dedicated to the requirements of the business. In the case of even a business corporation controlled by a single dominant stockholder, however, the existence of a surplus in excess of its working capital requirements

justifies an inference of the forbidden purpose. The reason here is that the funds of the corporation are at all times subject to the command of a single individual and, once the profits exceed the day to day requirements of the continuance of the business, the practical assurance that the accumulation is earmarked for business needs disappears. This consideration seems to underlie the following passage from the opinion of this Court in the *National Grocery* case, a part of the opinion which the court below appeared not to notice (304 U. S. at p. 294):

> Since Kohl was the sole owner of the corporation, the business would have been as well protected against unexpected demands for capital, and assured of capital for the purpose of any possible expansion, *by his personal ownership of the securities as by the corporation's owning them.* * * * [Italics supplied.]

A fortiori, where the corporation merely holds the stock in other companies and invests and reinvests its income, the existence of a surplus warrants an inference of the forbidden motive. For a corporation of this type exists solely and directly to increase the worth of its stockholders through the medium of enhancing its own capital worth. There is thus lacking even the assurance present in the case of a corporation actively engaged in a trade or business that its profits are dedicated to any purpose other than the immediate increase of the personal fortunes of those in control. And where the

character of such a corporation is drawn into question, the fact that all its shares are held by a single dominant stockholder would seem to be virtually decisive. Any claim that accumulation is made against "unexpected demands for capital" on the part of the companies in which stock is held or for an "expansion" of the corporation's stock holdings is answered by the fact that disbursements for such purposes could be as well made from the funds of the stockholder directly.[23]

We submit, therefore, that the fact that a single stockholder dominates the taxpayer corporation is highly pertinent to the determination both of the facts giving rise to the presumptions established by Section 104 (b) and of the ultimate fact of the existence of the condemned purpose.

I

THE BOARD'S FINDINGS AS TO THE CHARACTER OF THE TAXPAYER'S ACTIVITIES ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Rejecting the taxpayer's contention "that it supervises and directs the policies and business

[23] It should also be noted that a sole stockholder, in case of doubt, can easily protect his corporation against the tax imposed by Section 104 by the simple expedient, provided in Section 104 (d), of returning as a part of his own gross income his undistributed share of the corporation's net income. This expedient is less readily available to a group of shareholders, since Section 104 (d) provides that this action shall relieve the corporation from the Section 104 tax only where "all" of the shareholders have so returned their undistributed shares.

operations, other than the daily routine, of all the companies constituting the stockyards enterprise, and acts as banker for them" (III R. 935), the Board first found as an ultimate fact that the taxpayer is a "mere holding or investment company" (III R. 932, 935–939). In support of its determination, the Board expressly referred to the fact that in all of its income-tax returns for the years 1930–1933 the taxpayer described its business as that of "acquiring and guaranteeing securities" (III R. 937; I R. 478–479, Ex. 41–44);[24] that so far as appeared no securities were guaranteed after October 1, 1914 (III R. 937); that the payments guaranteed were amply provided for by the Jersey Company and the taxpayer had never been required to pay out a dollar on this account (III R. 937, 943–944, 913–914, 930–931; I R. 41–61, Ex. S–26; I R. 525, 526, 570–571, Ex. C, D, JJJJ–MMMM); that its income during the taxable years consisted solely of interest, dividends, and profits from the sale of securities (III R. 937, 922; I R. 478–479, Ex. 41–44); and that it used its funds principally for loans and investments in additional income-producing assets (III R. 937, 939–940; I R. 478–479, 526, Ex. 41–44, D). It also appeared, as the Board pointed out, that the taxpayer received no fees for the management or supervision of other corporations. Its office was Prince's office at 1 Court Street, Boston.

[24] The references before the semicolon are to the Board's opinion and findings; the remaining references are to the supporting evidence.

It had practically no office expenses and no rent except vault rent. Apart from Prince's salary of $50,000 it paid only salaries of $500 and "wages" of $2,000 per annum. (III R. 937, 938, 929; I R. 478–479, Ex. 41–44.) During the years 1930–1933 Prince was president of the Jersey Company and chairman of the boards of directors of the Transit Company and the Railway Company, receiving as compensation the respective amounts of $17,500, $17,500.08 and $12,499.92 for each year. The consolidated returns filed by the Jersey Company and its subsidiaries for these years represented that Prince devoted 58% of his time to the Transit Company and 42% of his time to the Railway Company for the years 1930–1932, and "part" of his time to each of the three companies for the year 1933. (III R. 938, 929; I R. 570–571, Ex. JJJJ–MMMM.) It also appeared that Prince and McDonough were trustees of the District (I R. 243). Accordingly, the Board found that the taxpayer did not in fact supervise or manage the other corporations making up the enterprise. The Board said (III R. 938):

> It is true, of course, that Prince supervised the operations of the Jersey Co. and all of its subsidiaries as well as of the subsidiaries of the petitioner. He was enabled to do this through ownership of all the stock of the petitioner, which had virtual control through stock ownership of the other corporations. He was president of the Jersey Co., from which he received an annual sal-

ary of $17,500. He was also chairman of the board of directors of the Transit Co., from which he received a like salary, and chairman of the board of directors of the Railway Co., from which he received a salary of $12,499.92. He dictated the policies of the petitioner and of all of the other companies. It does not appear, however, that the petitioner supervised and managed the operations of its subsidiaries and those of the Jersey Co. and its subsidiaries. Prince did this himself. So far as appears, there were no meetings of the board of directors of the petitioner for the determination of any acts to be done by any of the companies. The returns of the Transit Co. and the Railway Co. report Prince as devoting 58 percent of his time to the affairs of the former and 42 percent to the latter. *When directing the affairs of those companies Prince was acting as a paid employee of those companies and not of the petitioner.* [Italics supplied.]

The finding that the taxpayer was "a mere holding or investment company", raised the presumption of the condemned purpose established by Section 104 (b). And since, on the Board's appraisal, the other evidence failed to show that the taxpayer was not availed of to prevent the imposition of surtaxes on its stockholders (111 R. 939), this finding standing by itself, if valid, was sufficient to dispose of the case.

While overturning the Board's determination on this point, the Circuit Court of Appeals found no

fault with the Board's definition of a "mere holding or investment company"[25]; nor did it find that the Board had employed what the court referred to in another connection as an improper "legal yardstick" in reviewing the evidence (IV R. 1285–1288). The court simply concluded on the facts that the Board's was not a "permissible finding on the record, particularly in view of the subsidiary facts found by the Board" (IV R. 1285). In support of this conclusion the court drew its own picture of the taxpayer's operation, as follows (IV R. 1286):

> In the present case, petitioner was formed to be the directing head of the whole in-

[25] In the Board's view, the expression "mere holding or investment company" was used to differentiate a holding or investment company actively engaged in a trade or business from one whose sole income was from interest, dividends, and profit and whose sole activities were limited to those incident to an ordinary holding or investment company (III R. 935). This definition seems consonant with the purpose of the presumption and is supported by the decisions. *Wilson Bros. & Co.* v. *Commissioner*, 124 F. 2d 666 (C. C. A. 9th); *Haffer* v. *Commissioner*, 103 F. 2d 487 (C. C. A. 5th), affirming 37 B. T. A. 851, certiorari denied, 308 U. S. 576, rehearing denied, 308 U. S. 635; *Almours Securities* v. *Commissioner*, 91 F. 2d 427 (C. C. A. 5th), affirming 35 B. T. A. 61, certiorari denied, 302 U. S. 765, rehearing denied, 303 U. S. 666; *Keck Inc. Co.* v. *Commissioner*, 77 F. 2d 244 (C. C. A. 9th), affirming 29 B. T. A. 143, certiorari denied, 296 U. S. 633; *R. & L., Inc.* v. *Commissioner*, 84 F. 2d 721 (C. C. A. 5th), affirming 33 B. T. A. 857, certiorari denied, 299 U. S. 588. Moreover, special weight should be attached to the Board's judgment of a question of this character, connected as it is with the fact-finding function. Cf. *Gray* v. *Powell*, 314 U. S. 402, 411–413.

> tegrated enterprise, supplanting, in that respect, the Jersey Company, which became a "mere shell." Its purpose was to keep the enterprise intact, not to milk it dry and allow it to disintegrate in 1940. The commitments petitioner made in 1911 by guaranteeing dividends of 9 percent on the common stock of the Jersey Company, and the guarantee it made in the "by-pass agreement" of 1914, made it necessary for petitioner, in protection of its investment, to exercise an active supervision over the underlying operating companies, whose continued success was so vital to its own financial health. Since under the by-pass agreement, it drew up into its own treasury the earnings of the subsidiary companies without allowing the individual companies to make the accumulations which they normally would have needed for their own corporate purposes, petitioner, as banker for the enterprise, necessarily had to have a very substantial accumulation of funds at its disposal.

In the court's view, "the enterprise is a close-knit organism composed of many corporate members, of which petitioner is the corporate head, supplying the direction and coordination" (IV R. 1287).

If this description of the taxpayer's activities were required by the evidence, or if it followed necessarily from the Board's subsidiary findings, one might concede that the taxpayer falls short of being a mere holding or investment company.

We submit, however, that it does not follow from the evidence, that it is plainly inconsistent with the Board's findings, and that the Board's contrary determination is amply supported by substantial evidence. Manifestly, the court's view of the nature of the taxpayer's activities does not follow as a matter of law from the undisputed fact that the taxpayer is the top holding company of a vast enterprise, or that it was necessary for some man or group of men to direct the operations of the several operating companies, or that the taxpayer through its stock holdings and contractual rights was the technical repository of power over the enterprise. But it is also true that the court's determination, to the effect that the taxpayer supervised the operations of the subsidiaries and acted as banker for them, does not necessarily follow from the facts, likewise not in dispute, (1) that the taxpayer's sole stockholder, Prince, actively directed the affairs of the enterprise, or (2) that the taxpayer drew into its own treasury amounts which the underlying companies might have retained for their own requirements. Since the court seems to have based its decision of the entire case primarily upon these circumstances (IV R. 1271–1272, 1274–1276, 1286–1290, 1296–1297), we think it is advisable to consider them in detail.

(1) The Board found that it was not the taxpayer which supervised and directed the opera-

tions of its subsidiaries and those of the Jersey Company and its subsidiaries but that "Prince did this himself" (III R. 938). Criticizing this finding the court commented (IV R. 1288):

> How else could petitioner act except through the human beings who were its officers? Every corporation is controlled by some human being or group of human beings, but it is of the essence of the corporate privilege that the acts of the human beings in the exercise of the corporate powers are attributed to the corporation as a separate legal entity. It is all right to speak of petitioner as "Prince in corporate clothes"—so, if a partnership of fifteen members incorporates, the corporation may be described as the partnership in corporate clothes. This does not advance the argument much. Prince's stock ownership enabled him to sit in the driver's seat as president of petitioner. In that capacity he exercised petitioner's corporate powers. Among these powers, as the Board itself said, was petitioner's "virtual control through stock ownership of the other corporations" in the enterprise. It is of no significance in this connection that "petitioner received no fees for management and supervision"; under the circumstances, this would have been a superfluous bookkeeping formality. Nor is it important that petitioner "had practically no office expenses," and no large force of employees. For general supervision of the

> enterprise it needed only the brains of an executive of high caliber. Prince has been receiving $50,000 a year as president, and petitioner has regularly deducted this expense on its income tax returns, without challenge from the Commissioner, so far as appears.

We think that there is nothing in these observations which properly casts doubt upon the determination of the Board. Giving full play to the fiction of independent corporate personality, the taxpayer as the top holding company of the stockyards enterprise was in a position to supervise and control at every point the activities of the various subsidiaries. For this purpose the taxpayer might have built up a large staff of operating men, including a force of analysts and statisticians; it might have collected the entire gross income of all the operating units and paid the day-to-day expenses of the operations from its own funds. If this had been done, the taxpayer indeed would have been inextricably interwoven with the wealth-producing functions of the enterprise. But obviously nothing made it "necessary," as the court thought (IV R. 1286), for the taxpayer to fill this role. Its continued corporate existence under the laws of Maine did not require it to direct anyone; no contract required it; for the protection of its stock investment and its position under the guarantees of October 1, 1914, it might have been content to rely upon the selection of compe-

tent directors and officers for the underlying companies and to permit them to run these units without injecting itself into their affairs.[26] In short, it would have been no disparagement of the taxpayer's corporate personality or separate legal entity for it to have served merely as a repository for the collection of dividends or interest. Or, as a third alternative, the taxpayer might have authorized the directors and officers of the operating companies to rely upon the advice and supervision of some third agency. Invocation of the corporate fiction throws little light on what was actually done."

The course which the taxpayer did follow depended on the wishes, prior to 1922, of Prince and Arthour jointly, and, after 1922, of Prince alone. During the latter period the taxpayer was completely controlled by Prince and any fair diagram of the stockyards enterprise would either omit both the taxpayer and Prince or include both, since it was Prince, and not the taxpayer, who was the top repository of power. After 1922, therefore, the taxpayer could have no purpose or activities apart from Prince. The converse, however, was not true. Prince was free to use the taxpayer or not as he saw fit, just as he was free

[26] The evidence is uncontradicted that prior to 1926 the operating men in Chicago did manage the activities of the underlying companies "without any material control from the East" (1 R. 142–144, 290). During this period reports of operations were sent, not to the taxpayer, but to F. H. Prince & Company (1 R. 143).

to use his wholly-owned brokerage house, F. H. Prince & Company or his wholly owned Pau Corporation, in connection with the protection and expansion of his investment in the stockyards enterprise.[27] Similarly, Prince could have managed the affairs of at least some of the operating companies by reason of his being an officer in them. Or, he could act in his individual capacity without the insulation of a corporate identity or corporate office. With respect to the actual management of the units of the enterprise, the same alternatives which were open to the taxpayer were obviously open to Prince. True, orders given by Prince as an individual would carry weight only because of the recognition that ultimate power over the enterprise rested in him. But they carried precisely the same weight whether or not Prince utilized the taxpayer's corporate machinery for the purpose *or whether Prince, indeed, held any office in the taxpayer's organization.* Thus, the fact that

[27] Prince in fact did use both of these companies in this connection. For example, over many years prior to 1918 Prince purchased through F. H. Prince & Company some 18,000 shares of Jersey Company common, which he did not transfer to the taxpayer until the latter year (III R. 946–947, 927; I R. 325). As to the Pau Corporation, see *supra*, pp. 10–11. It will be noted that the diagram of the enterprise adopted by the court erroneously shows the Pau Corporation to be wholly owned by the taxpayer, rather than by F. H. Prince & Company (IV R. 1267 and annexed insert). The Board's finding, based upon a stipulation, is to the contrary (III R. 911; I R. 68; cf. I R. 323).

directions and orders were found to have been issued by Prince provided no easy solution for the problem which faced the Board.

The theory of the court—that the direction of the enterprise necessarily flowed from the holder of legal title to the stock—becomes even more artificial when viewed in the light of the obvious purpose of the holding-company presumption. The basis of the presumption is found in the fact that the mere circumstance that a company holds stock in an enterprise does not ordinarily entail the active management of a business on its part. Evidence that the holding company does run the business is inconsistent with the presumption, since it *prima facie* shows a need on the part of the holding company for the accumulation of substantial sums to meet the requirements of the business. But where, as here, the holder of the stock has not built up an organization for the management of an enterprise and the only directions given are those of its sole stockholder and his personal assistant, the reasons for removing it from the holding-company presumption are lacking.

Accordingly, there is no escaping the conclusion that it was the duty of the Board to make a careful appraisal of all the evidence which bore upon the question of whether the taxpayer actively managed the enterprise. This the Board did.

Finally, the court seized upon and quoted (IV R. 1287–1288) a long passage from the findings of the Board which, in the court's view, were inconsistent with the Board's ultimate finding on the question of management and supervision. This finding (III R. 929–930), as quoted by the court, appears as follows:

> Until his death in 1926, J. A. Spoor was president of the Transit Co. and in complete control of the Transit Co., Railway Co., and Elevated Co. He sent reports to F. H. Prince & Co. in Boston. After Spoor's death Prince became chairman of the board of directors of the Transit Co. and *representatives of the petitioner went to Chicago with increasing frequency, giving orders and directions.* [Italics the court's.] There was daily contact by telephone between the men operating the companies in Chicago and the officers of the petitioner. Prince handled the stockyards banking situation from 1930 to 1933. Ultimate choice as to officers, directors, and other personnel was dictated by Prince and he decided dividend policies. He also gave instructions as to the banks in which funds were to be deposited and his authority was necessary for unusual expenditures by the Transit Co. After the destruction of part of the stockyards by fire, the president and vice president of the petitioner went to Chicago and gave orders as to what buildings should be rebuilt and how. The yards

were not entirely restored. The restoration was paid for with insurance funds received by the Transit Co. In certain instances suggestions of the officers in Chicago were rejected by Prince. In 1933 Prince refused to permit the Transit Co. to spend enough money to build fireproof hog and sheep houses requested by the men in Chicago. Prince granted permission to rebuild the amphitheatre in which the International Live Stock Exposition was held.

Produce Terminal, the Transit Co., the District, and the Railway Co. sent to the petitioner monthly reports showing a summary of operations, which, except for the District's report, were copies of reports required by the Illinois Commerce Commission, the form of reports by the Transit Co. having been devised by its auditors. The petitioner assisted the District on many occasions in financing the construction of buildings. In 1932 it furnished between $300,000 and $400,000 for one building.

In a footnote to the above (IV R. 1287), the court also quoted the testimony of A. G. Leonard, the president of the Transit Company, as follows: "Well, the Maine Company [the taxpayer] was practically in the saddle, and I was about the hired man." [28]

As an isolated matter the statement that "representatives" of the taxpayer "went to Chicago with

[28] This testimony, given on direct examination, appears at I R. 144.

increasing frequency, giving orders and "directions" may appear inconsistent with the Board's ultimate finding. It will be noted that in the same passage, however, the Board repeatedly refers to actions taken by Prince. The above finding was based upon the testimony of the taxpayer's own witnesses, including Leonard,[29] who referred interchangeably to the taxpayer and to Prince as the source of the instructions given the operating companies (I R. 142–151, 190–194, 221–222, 226, 229–230, 243–246, 252–253, 287–290). The only two persons who could have been referred to as "representatives" of the taxpayer were Prince and his assistant, McDonough (I R. 148, 286–287, 312). In Prince's absence, McDonough stepped into his shoes (I R. 287). *During this period, however, McDonough was not an officer of, and did not even receive a salary from, the taxpayer* (I R. 287, 300). Nor could McDonough recall that any corporate action had even been taken by the taxpayer's board of directors with respect to the operations of the other companies (I R. 312–313).

It was for the Board to reconcile the testimony and to draw its own inferences, and there can be no mistake as to the ultimate inference which it

[29] It is striking to contrast the treatment accorded Leonard's testimony by the court below with the treatment of a somewhat similar situation by another Circuit Court of Appeals in sustaining a finding of fact. See *Black Diamond S. S. Corp.* v. *National Labor R. Board*, 94 F. 2d 875, 878 (C. C. A. 2d), certiorari denied, 304 U. S. 579.

drew. From the foregoing survey it seems perfectly clear that there was substantial evidence to support the Board's finding that the taxpayer did not supervise and manage the operating companies.

(2) During the period from 1922 to 1933, inclusive, the taxpayer, as the Board found (III R. 1202), drew into its own treasury from the Jersey Company and its subsidiaries amounts somewhat in excess of the net earnings of these companies. The court below seems to have been greatly impressed by this fact, but this certainly does not lead to the necessary conclusion that the taxpayer was therefore acting as the "banker" for the stockyards enterprise. This circumstance, in truth, is meaningless unless all of the concomitant facts are taken into account. Here also the Board reviewed the evidence with care, directing its inquiry to the taxpayer's precise contention that it did serve as "banker" for the enterprise. The considerations bearing upon this issue are as follows:

(A) Despite the vast sums which the taxpayer drew from the various subsidiaries, these companies were left with substantial resources to carry on their own operations. At the beginning of the taxable years, the liquid assets of Produce Terminal amounted to $499,575.93 and the liquid assets of the Jersey Company and its subsidiaries amounted to $9,594,363.94 (III R. 914; I R. 44–45, 525, Ex. C). Due primarily to the de-

mands of the banking crisis of 1930–1933 (I R. 199–207) these assets were substantially reduced during this period, but they nevertheless remained very considerable. At the end of 1933, the liquid assets of Produce Terminal amounted to $111,186.07 and the liquid assets of the Jersey Company and its subsidiaries amounted to $3,804,885.62 (I R. 525, Ex. C). At the end of the first taxable year, 1930, the earned surplus of the Jersey Company and its subsidiaries and of Produce Terminal approximated $18,250,000. At the end of 1933 such earned surplus approximated $17,750,000 (III R. 922–924; I R. 526, Ex. D). Only the Elevated Company showed a deficit in its earned surplus account, and this subsidiary was engaged in no active operation (I R. 224). The surplus for the other subsidiaries at the end of 1933 ranged from a low of $1,182,516, in the case of Produce Terminal, to a high of $5,699,978, in the case of the District. Under the bypass agreement of October 1, 1914, the Jersey Company was required to use its earnings to pay all expenses of operations and to provide for all its obligations (I R. 63, Ex. S–46). At no time, so far as the evidence discloses, did Produce Terminal, the Jersey Company or any of the subsidiaries of the latter find it necessary to call upon the taxpayer for operating expenses. When the South Side Elevated Railroad Company, the

lessee of the Elevated Company's line, went into receivership in 1932, the Jersey Company—referred to by the court below as a "mere shell" (IV R. 1286)—paid the rental without calling upon the taxpayer for assistance (I R. 224–225). During the banking crisis the Transit Company and Produce Terminal invested $3,750,000 in the securities held by the stockyards banks, and these two companies and the District subordinated bank deposits of $2,200,000 in order to assist such banks (III R. 914–915; I R. 199–207, 276–277, Ex. 18–20). Except possibly in the case of the District, these amounts were expended without any assistance from the taxpayer.

(B) The argument, apparently, is that the earnings of the Jersey Company and its subsidiaries which were drawn into the taxpayer's treasury remained dedicated to the business needs of the operating companies. The court below accepted this view (IV R. 1271–1272, 1292–1293). But the briefest consideration shows that the interests of Prince and the taxpayer, on the one side, were not identical with those of the Jersey Company and its subsidiaries. As a result of its guarantee of 9% dividends on the common stock of the Jersey Company (I R. 61–62, Ex. S–39, S–40, S–41) and the bypass agreement of October 1, 1914 (I R. 63, Ex. S–46), the taxpayer was assured of a handsome revenue from the Jersey Company during the life of these arrangements. It was to the tax-

payer's interests to see that the income continued to flow in. But the holders of the guaranteed common stock, as well as of all the preferred stock, retained full voting rights in the Jersey Company; and the guarantee arrangements gave the taxpayer no right to the assets upon a liquidation of the Jersey Company.[20] At the end of 1914 the taxpayer held less than one-fourth of the total voting stock of the Jersey Company, and even by the end of 1933, after the expenditure of more than $11,000,000 in such acquisition, it held less than a majority (I R. 67–68, Ex. S–59, S–60).

Funds which were permitted to remain in the Jersey Company's treasury were held in trust for the benefit of that company and all its shareholders. See *Pepper* v. *Litton*, 308 U. S. 295, 306–307. They were given a practical protection by the fact that as late as 1933 a majority of its voting stock was in hands other than taxpayer's. Jersey's corporate funds were not available for the use of one group of stockholders in order to

[20] With respect to the foregoing statements concerning the 1911–1914 agreements, we do not wish to be understood as expressing any opinion as to the legal effect of the complicated transactions involved and the respective rights of the parties under them. For present purposes, it is sufficient to accept the statement of taxpayer's counsel in this regard (I R. 100–101). Also see the testimony of the taxpayer's witness, Walker (I R. 503–504). Certainly the court below agreed that the taxpayer's and Prince's interests were not identical with those of the other Jersey shareholders (IV R. 1293). But see *infra*, pp. 72–74.

strengthen their position in relation to others; if any of its funds were used to buy in its own stock, the benefits of the purchase would accrue to the advantage of all the remaining stockholders; and similarly, the purchase of any of its bonds, outstanding in the aggregate amount of $14,000,000 and maturing in 1940 (I R. 52–53, 526, Ex. D), would redound to the advantage of the enterprise as a whole and all its stockholders.[21]

On the other hand, the funds which found their way into the taxpayer's treasury were subject to no such legal or practical restraints. Purchases of the stock of the Jersey Company or even of its bonds accrued, not to the advantage of the enterprise as a whole, but to the taxpayer alone. *The Jersey Company itself could not have justified accumulation of its profits for such purposes.* See *Williams Inv. Co.* v. *United States*, 3 F. Supp. 225, 232 (C. Cls.); *Trico Products Corp.* v. *Commissioner*, 46 B. T. A. 346, 378. Of course it was to the interest both of Prince and of the taxpayer, as a stockholder in the Jersey Company, to see that its obligations were paid off or refinanced in 1940 and that their retirement did not result in the dismemberment of the stockyards enterprise. In this, however, Prince and the taxpayer had only the interest which any other substantial investor

[21] The taxpayer's witness, Blough, agreed that for the protection of the creditors of the Jersey Company "the funds might better have been left down there" (I R. 472–474).

in the stock of the Jersey Company would have had. Their interest became coincidental with the interest of the Jersey Company only as their stock holdings approached 100%.

This diversity of interest between the taxpayer and the enterprise as a going concern would seem in itself enough to warrant the Board's rejection of the theory that the taxpayer was the "banker" for, or an integral part of, the stockyards enterprise. Certainly the taxpayer cannot assail the Board for viewing its "activities * * * in the light of manifest interest and purpose." *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 559. The Board, however, proceeded to analyze the use which the taxpayer in fact did make of its earnings.

(C) During the period 1930–1933, the taxpayer's earned surplus was increased by $8,643,373 (III R. 919; I R. 70, 526, Ex. D). It loaned $1,625,000 to the District, invested $3,573,218 in the securities of stockyards banks, which needed assistance (III R. 914–915, 927; I R. 280–282), subordinated deposits of $1,800,000 to the credits of others in stockyards banks (I R. 276–277, Ex. 17), and invested $1,500,000 in Western Associates, Inc., to enable it to hold the shares in a new bank (I R. 68–69). The loan of $1,625,000 to the District was used to retire fixed obligations and to purchase capital assets (I R. 246–248). Since the District at this time enjoyed a substan-

tial earned surplus, amounting at the end of 1933 to more than $5,500,000, the Board would seem to be justified in its comment (III R. 942) that the necessity for this loan, if any existed, is not shown. This loan, as well as the investment of $1,500,000 in Western Associates, Inc., amounted simply to substantial capital investments by the taxpayer. This was likewise true of the money invested in the stockyards banks. These outlays were, of course, on a different footing from other investments since the taxpayer stood to lose by them and they were thought to be required for the protection of the enterprise as a whole. They were the kind of investments, nevertheless, which any stockholder might, in unprecedented circumstances, feel called upon to make in order to protect his equity. They would seem to be good examples of the "unexpected demands for capital" referred to by this Court in the *National Grocery* case, *supra*, p. 294.

(D) In addition, the taxpayer increased its cash loans to Prince in the amount of $1,743,600 (III R. 916, 947; I R. 69, Ex. S–65), loaned $236,536 to the Pau. Corporation, wholly owned by Prince, without interest (III R. 927; I R. 68), spent about $425,000 for additional stock of the Jersey Company (III R. 927–928; I. R. 67–68, Ex. S–59, S–60), and spent $423,000 in purchasing its own 5% bonds, which did not mature until 1961 (III R. 927–928; I R. 68, Ex. S–62). Prince invested $1,000,000 of the sums loaned to him in order to purchase a large block of stock in Armour & Company. This

purchase, in part, enabled him to become chairman of the board of directors of that company and, according to the Board's finding, to retain its business for the Chicago stockyards (III R. 926; I R. 349–351). Aside from this aspect of the loan to Prince and the loans to the Pau Corporation, none of the transactions referred to in this paragraph had any bearing upon the welfare of the enterprise as a going concern. The Board, moreover, could not ignore the fact that all of the loans to Prince were made without strings, so that the taxpayer was unable to control Prince in the use he might make of them; nor could the Board ignore the circumstance that the Pau Corporation, while financially a part of the enterprise, was the personal property of Prince. Despite the fact that the taxpayer had immense sums of cash on hand, amounting at the end of 1933 to $7,645,235 (III R. 918; I R. 526, Ex. D), the evidence failed to disclose that the taxpayer had ever advanced funds to the Jersey Company for the retirement of its bonds—an action which would have strengthened the financial position of that company and its operating subsidiaries. And despite the discount at which these bonds sold from time to time, it did not even appear that the taxpayer itself had purchased any of the bonds of the Jersey Company or of the Elevated Company in preference to its program of stock purchases (III R. 925–926, 931).

(E) The taxpayer's loans to Prince, aggregating $4,848,000 at the end of 1933 (III R. 916; I R. 69, Ex. 8–G),[1] are especially revealing as to the purposes to which the taxpayer's funds were dedicated and hence the true character of its activities. Obviously, these loans put Prince personally into possession of funds which would otherwise have been available to him only through the declaration and payment of dividends. The Board expressly found (III R. 947) that there was "no satisfactory explanation of why the petitioner did not make a dividend distribution to Prince of the funds which he needed."[2]

Assuming that the taxpayer's accumulations of funds were dedicated to the welfare of the enterprise as a whole, the court below took the view that the loans were of little or no significance unless it were first determined that the taxpayer's accumulations were too large. The court thought

[1] This is apart from the taxpayer's loans of securities to Prince (III R. 916).

[2] In the following cases weight has been attributed to the fact that the taxpayer corporation made loans to its dominant stockholder or stockholders rather than paying dividends: *Helvering* v. *Nat. Grocery Co.*, 304 U. S. at pp. 293–294; *United Business Corp.* v. *Commissioner*, 62 F. 2d at p. 755; *J. M. Perry & Co.* v. *Commissioner*, 120 F. 2d at p. 126; *A. D. Sacrider, Inc.* v. *Commissioner*, 84 F. 2d 23, 24 (C. C. A. 5th), certiorari denied, 299 U. S. 577; *Wilson Bros. & Co.* v. *Commissioner*, 124 F. 2d 606, 609 (C. C. A. 9th); *Wilkerson Daily Corp.* v. *Commissioner*, 125 F. 2d 998, 1000 (C. C. A. 9th); *Olin Corp.* v. *Commissioner*, 128 F. 2d 185, 186–187 (C. C. A. 7th).

that since the loans "bore interest" and were amply secured by a deposit of collateral," they "did not impair petitioner's plan of accumulation." (IV R. 1295). The court also apparently thought that a system of loans to Prince was quite different from declaring out its earnings in dividends since a corporation should not rely "upon its stockholders coming to its rescue as the need arose" (IV R. 1292).

But even assuming, contrary to fact, that the taxpayer could justify large accumulations for its corporate needs, the loans to Prince might properly have impressed the Board as inconsistent with a plan of accumulation on the part of the taxpayer, and as showing that its purposes and plans were inextricably interwoven with those of Prince the individual. There is, of course, not a trace of evidence that "a prudent board of directors" (IV R. 1293) decided upon these loans after objective consideration as one step in an investment program. Moreover, the ample security referred to by the court consisted principally, as the Board found, *of the taxpayer's own common stock.* (III R. 917.) For example, the collateral so pledged by Prince had a value at December 31,

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The provision for interest emphasizes, rather than detracts from the tax avoidance aspects of these transactions. For, the interest would be deductible from Prince's gross income; and although it would be included in the taxpayer's gross income, it would be taxed at corporate rates which would be less than the surtax rates applicable to Prince.

1933, of $8,664,199, of which $7,594,408 represented 21,520 shares of the taxpayer's common stock. (I R. 337, Ex. 24.) This meant, to the extent that its own shares were pledged with it, that the taxpayer held as security only an assignment of Prince's interest in its capital and surplus less the amount of the loans—assets which would have been available to it in the absence of any security. So far as this type of collateral was concerned, the taxpayer's resources were reduced by precisely the amount of the loans. In appraising the evidence for itself, the court below failed to mention the nature of the collateral.[35]

(F) As for its own obligations, the taxpayer was contingently obligated under the guarantee

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[35] Generally, with respect to the character of the taxpayer's activities, it may be noted that Article 542 of Treasury Regulation 74 (Appendix, *infra*, pp. 90-91) provides that—

"* * * When one corporation owns the stock of another corporation in the same or a related line of business *and in effect operates the other corporation*, the business of the latter may be considered in substance the business of the first corporation. * * *" [Italics ours.]

but that

"* * * Investment by a corporation of its income in stock and securities of another corporation is not without anything further to be regarded as employment of the income in its business."

The Regulations thus require the determination of each case on its peculiar facts. Moreover, that portion of Article 542 which permits the business of a subsidiary to be attributed to the parent is inapplicable here, for it states that "it is ordinarily essential that the first corporation own *substantially all* of the stock of the second." Since the taxpayer owned only about one-half of the Jersey Company stock, it is plain that these provisions of the Regulations are inapplicable here.

agreements referred to (*supra*, pp. 7–8, 9–10), and was liable on its own bonds, outstanding in the amount of $3,227,000 at the end of 1929 and maturing in 1961 (III R. 918–920; I R. 526, Ex. D). So far as the 1911 guarantee of a 9% dividend on the Jersey Company common was concerned, the assenting stockholders had originally relied only upon the taxpayer's cash capital of $1,000,000 plus their lien upon the Jersey Company's distributions (I R. 61–62, Ex. S–39, S–40, S–41). So long as the Jersey Company remained able to make annual distributions in excess of 9%, the taxpayer needed no accumulations to meet these payments. And in view of the financial position and earnings of the Jersey Company (*supra*, pp. 56–58), the Board was justified in its view that the taxpayer's contingent liability under the bypass agreement had become of no practical importance (III R. 941). The bonds, outstanding in the amount of $3,227,000, had been issued, not to finance operations, but simply to acquire for the taxpayer additional blocks of Jersey Company common, and they were secured by the Jersey Company common so acquired (I R. 62, 67, Ex. S–42, S–59). The taxpayer did not attempt to justify the accumulations here involved on the basis of the liabilities referred to in this paragraph (Cf. I R. 354–370).[38]

[38] The court below seems to have suggested that the taxpayer might have been liable in tort to the stockholders and creditors of the Jersey Company in view of its course of conduct under the bypass agreement (IV R. 1291). We can hardly debate that question in this proceeding. Suffice to say that the taxpayer's "prudent board of directors" did not chart their course, so far as appears, on that assumption.

Moreover, in determining whether such obligations removed the taxpayer from the category of "mere holding or investment" companies, the Board was entitled to take the purpose for which the obligations had been incurred into account. See *Beim Co.* v. *Landy*, 113 F. 2d 897, 900 (C. C. A. 8th).

From the above it seems clear that there was ample evidence to support the Board's findings that the taxpayer was not an integral part of the stockyards operations but, rather, was the personal investment vehicle of Prince. Before the Board taxpayer's counsel declared that it "was organized with a view to some day owning this enterprise" (III R. 1004). We think that a fair statement of the character and purpose imputed to the taxpayer by Prince during the taxable period is the issue.

The Board's ultimate finding that the taxpayer was a "mere holding or investment company" had powerful support in the record. It was as much a finding of fact as the Board's determination in *Wilmington Trust Co.* v. *Commissioner*, 316 U. S. 164, that a certain transaction was not a "short sale." If the reviewing court had no authority to reject the finding in that case, there was similarly no authority to do so here. See also *supra*, pp. 29–30.

II

THE BOARD'S FINDING THAT THE TAXPAYER ACCUMULATED ITS PROFITS BEYOND THE REASONABLE NEEDS OF ITS BUSINESS IS WHOLLY VALID

In the alternative, the Board considered the taxpayer as a management company and examined its business needs viewed in that capacity. The Board found as an ultimate fact that the evidence failed to disclose "a reasonable need * * * for any further accumulation of gains and profits during any of the years 1930, 1932, and 1933," and that here also the countervailing evidence failed to overcome the presumption (III R. 945).

Since the court below held that the Board had failed to use the proper "legal yardstick" in appraising the reasonable needs of the taxpayer's business, it is of special importance to notice the precise reasoning of the Board upon this issue, as well as its findings and the supporting evidence. The Board pointed out that, even considered as a management company, the taxpayer required only $52,500 a year for the payment of salaries and wages in connection with the management of the enterprise, and that its annual income amply provided this (III R. 941). Secondly, the Board reviewed the other obligations of the taxpayer and assumed that some accumulation of profits might have been justified on this score. Pointing to the earned surplus of almost $20,000,000 at December 21, 1929, however (III R. 912; I. R.

526, Ex. D), the Board determined that there was certainly "no indication of the need for any further accumulation in the years 1930, 1932, and 1933" (III R. 941). The Board's finding with respect to the satisfaction of the obligations and commitments referred to in this paragraph was palpably correct, and the court below did not hold to the contrary.

The Board then discussed Prince's alleged plan of accumulating by 1940 some $36,500,000 of cash and liquid assets in the treasury of the taxpayer, Produce Terminal and the Jersey Company and its subsidiaries for the purpose of paying off in its entirety the outstanding bonded indebtedness of $23,963,000, of purchasing the outstanding preferred stock of the Jersey Company at a cost of about $6,500,000 and the remaining common stock at a cost of more than $1,000,000 and of setting aside $5,000,000 for working capital (III R. 942). The Board also reviewed the financial position of the entire enterprise at the end of 1929 and observed that it then had liquid assets of some $19,690,000 and total assets in excess of liabilities of some $40,000,000, not taking into account the fact that the books did not fully reflect the real value of certain of the fixed assets (III R. 943–944, 917–924; I. R. 525, 526, Ex. C, D). But in thus turning to the alleged plan of accumulation and the condition of the enterprise as a whole, it is clear that the Board did not regard such an

accumulation as within the taxpayer's reasonable business needs. For example, after reviewing the plan of accumulation the Board said (III R. 943):

> We do not think that an accumulation of surplus for the purposes above indicated was within the reasonable needs of the petitioner's business. As above indicated, the petitioner was obligated to pay off only $3,227,000 of the $23,960,000 bonds outstanding at the end of 1929. It had on hand more than twice as much cash as was necessary to redeem those bonds and they did not become due until 1961.
>
> Clearly, there was no reasonable need for the petitioner to acquire the balance of the common stock and the outstanding preferred shares of the Jersey Co. *Amounts spent in the acquisition of those shares simply represented investments by the petitioner.* The same also is true of any amounts that it might expend in acquiring the bonds of the Jersey Co. and its subsidiaries. [Italics supplied.]

Similarly, the Board observed that under his program Prince, through the instrumentality of the taxpayer, would own in 1940 assets of a value of more than $60,000,000, free of debt—an ambition irrelevant to the reasonable business needs of a corporation (III R. 944–945).

Even assuming, contrary to the Board's finding discussed in Point I, that the taxpayer was a management company and furthermore that its

reasonable needs might include the needs of the entire stockyards enterprise, there can still be no basis for the court's conclusion (IV R. 1292–1293) that the taxpayer's acquisition of the entire enterprise in 1940 was within the reasonable needs of the business of the enterprise. The court's theory proceeds upon the wholly false assumption that the Jersey Company would have to be "liquidated" in 1940, and that it would therefore be to the best interests of the enterprise for the taxpayer to buy out the "minority" (IV R. 1293) security holders. But there is nothing to show that such "liquidation" was inevitable, even if Jersey's charter did expire in 1940. The ease with which corporate charters may be obtained is well within the realm of judicial notice. Plainly, Jersey could have been reincorporated in 1940 without any disturbance of the continuity of the enterprise. Taxpayer's acquisition of the so-called minority interest in Jersey and the subsequent liquidation of Jersey would certainly promote Prince's ambition to own the stockyards unhampered by "minority" groups; but that objective could hardly be said to be within the reasonable needs of the stockyards enterprise. Indeed, the minority stockholders of Jersey might view the situation in quite a different light.[37]

The evidence certainly did not require a finding that the day-to-day operations of the stock-

[37] It is to be borne in mind that as late as December 31, 1933, the taxpayer owned less than a majority of the voting stock of the Jersey Company (*supra*, p. 59).

yards and the other operating units would be handicapped by the fact that a part of their stock was held by other interests; and the great success of the enterprise during the past 25 years, when the stock was so held, provides affirmative evidence to the contrary. Thus, if, as the court believed, the taxpayer had need for buying up or redeeming the shares of the Jersey Company held by others than itself, this need stemmed only from the fact that the taxpayer's interests were essentially different from the needs of the enterprise as a service-rendering and wealth-producing organization.

Similarly, the liquidation of the Jersey Company was a reasonable business need of the taxpayer, on any view, only upon the assumption that the taxpayer was to take over the entire stockyards enterprise. The testimony of the Government's expert witnesses, referred to by the court (IV R. 1291, fn. 10), was framed upon this hypothesis (II R. 660–706, 775–809, 839–848, 851–853). But here, also, the evidence certainly did not require a finding that the operating interests of the enterprise demanded the Jersey Company's liquidation. If from the standpoint of the enterprise one of the holding companies should have been eliminated, the axe might as well have fallen upon the taxpayer as upon the Jersey Company. A need for the liquidation of the Jersey Company can be imputed to the taxpayer only by attributing to it an interest and purpose separate and

apart from that of the enterprise as a going business. That the Jersey Company and its subsidiaries had no business need for the ownership of all of its shares by a single stockholder, whether the taxpayer or some other interest, seems too clear for further argument. See *Williams Inv. Co.* v. *United States*, 3 F. Supp. at 232.

In concluding that the Board had used "an improper 'legal yardstick' by which to measure" the taxpayer's needs (IV R. 1290), the court did not take the further step of holding that the accumulations of the enterprise as of December 31, 1929, were insufficient even to meet the expanded business needs which it vaguely (IV R. 1293–1295) outlined. But since the Board had failed to consider the preexisting accumulations in the light of what the court considered to be the taxpayer's true business needs, it remanded the case to the Board for findings on this point and for a reexamination of its ultimate determination in the light of such findings [38] (IV R. 1290–1291, 1296–1297).

[38] It should be observed that the remand did not leave it open to the Board to determine whether the projected 1940 "liquidation" of Jersey was within the reasonable needs of the business. The court apparently determined that question for itself. It merely left it to the Board to find whether the accumulations in question were necessary for that purpose. This was a false issue, for the court erred in finding that such a purpose was within the reasonable needs either of the taxpayer or of the enterprise as a whole.

We do not disagree, for present purposes, with the ruling of the court that (IV R. 1291)—

> Accumulation "for the reasonable needs of the business" is not limited to making provision for the bare legal obligations of the corporation but may include accumulation in furtherance of a *reasonable business program* for protection and enhancement of the corporation's pecuniary interests. [Italics supplied.][39]

But there is nothing in the Board's decision which is to the contrary. That proposition is irrelevant unless it is first determined that the taxpayer's business is that of actively operating and financing the enterprise as a whole (shown to be otherwise in Point I), and that the objective sought to be attained by the accumulation is within the reasonable needs of the enterprise (shown to be otherwise here in Point II).

Accordingly, while the court's treatment of this issue is expressed in terms of an error in law, the Board's alleged error differs essentially from that of a trier of fact which has excluded or otherwise failed to consider relevant and competent materials. Whatever the validity of the court's legal postulate as to business needs, the Board committed no error of law unless its basic

[39] As we have seen (*supra*, pp. 39–40), the court's proposition probably goes too far as applied to a one-man corporation, even when the corporation is actively operating a business. Cf. *Helvering* v. *Nat. Grocery Co.*, 304 U. S. at p. 294.

finding as to the character of the taxpayer's activity is overturned and, in addition, the well-being of the enterprise is shown to require the ownership of all its shares by a single stockholder, the taxpayer. Prince's ambition to buy out the "minority" interests and take over the entire enterprise could not, on any view, raise itself to the level of a business need of the taxpayer. The critical error of the court below lies in its failure to accord the Board's factual determination the weight to which it is entitled under the controlling decisions. If the court erred in this, it remanded the case on a false issue.

III

EVEN APART FROM THE PRESUMPTIONS, THE BOARD'S DETERMINATION IS VALID

Finally, the Board, as did this Court in the *National Grocery* case, 304 U. S. at p. 294, considered the evidence without the aid of the statutory presumptions and found that the taxpayer was "availed of" for the prohibited purpose. The Board unequivocally stated (III R. 947):

> Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of

> cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932.

The Board's opinion then makes further reference to the considerations which led to its ultimate determination. Fundamental here is a picture of the taxpayer corporation utilized by Prince as his personal vehicle for the accumulation of a vast fortune through the medium of applying the earnings of the enterprise to buy out the other security holders. To the Board the taxpayer "was the *alter ego* of Prince. It was Prince in corporate clothes." (III R. 946.) Citing the *National Grocery* case the Board concluded that (III R. 946)—

> It was of no moment to Prince whether the earnings of the petitioner were carried in his individual pocketbook or in his corporate pocketbook, except that if they had been received in the first instance in his individual pocketbook or distributed to him by the petitioner he would have been subjected to heavy surtaxes upon them, while he avoided such surtaxes by retaining them in the corporation.

The taxpayer was the means by which Prince had succeeded in accumulating up to 1929 a for-

tune of from $15,000,000 to $20,000,000 practically immune from taxation, since the taxpayer's income consisted almost exclusively of dividends from domestic corporations which were a legal deduction in determining its taxable net income (III R. 946).[*] The Board also referred to its finding that during the taxable years Prince had saved more than $1,300,000 in surtaxes by virtue of the taxpayer's failure to pay out its earnings in dividends (III R. 948, 931; II R. 853–854, Ex. YYYY). The large loans to Prince over a period of many years were again referred to (III R. 947).[**] Finally, the Board adverted to the fact

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[*] The taxpayer's net earnings for the years 1911–1923, inclusive, aggregated $34,619,278.70 (III R. 918; I R. 63–64, 70, Ex. S-51). The evidence showed that for the years 1917 to 1933, inclusive, Prince paid individual income and surtaxes as follows (I R. 562–565, Ex. CCC–TTT):

1917	$2,242.40	1926	$5,613.56
1918	1,883.30	1927	7,060.42
1919	None	1928	46,652.80
1920	None	1929	15,656.01
1921	None	1930	51,570.96
1922	None	1931	26,061.08
1923	$197.25	1932	20,023.94
1924	1,575.77	1933	19,164.29
1925	None		

Compare the similar table appended to the opinion of this Court in the *National Grocery* case (304 U. S. at pp. 292–293, footnote 9).

[**] We have pointed out (*supra*, pp. 64–66) the error of the court below in thinking that these loans did not interfere with the taxpayer's alleged plan of accumulation, and that they lacked probative force unless it was first decided that the taxpayer's accumulations were unreasonably large.

that Prince on several occasions had effected individual tax losses by the device of selling securities to the taxpayer, and that the taxpayer had likewise taken tax losses by selling securities to F. H. Prince & Company, Inc. (III R. 947–948, 928–929, 1202; I. R. 70, 533–534, Ex. E.) The Board observed that the (III R. 948)—

> * * * shifting of these securities from Prince to the petitioner and from the petitioner to Prince really meant no economic loss to Prince and the investment by the corporation of the amounts of money spent in acquiring the securities from Prince was not in furtherance of the program which Prince claims to have had for the corporation.

We have considered a number of the above facts in connection with the character of the taxpayer's activities (*supra*, pp. 41–69), since they relate to that issue. Others, however—namely, the loans to Prince, the tax loss sales and the vast amounts of surtaxes actually avoided—have probative value apart from the character of the taxpayer's activities or its reasonable business needs. The Circuit Court of Appeals went to the verge of understatement when it said, referring to the tax loss sales (IV R. 1296): "At most, these transactions might be taken to indicate that Prince was not wholly unmindful of tax consequences nor averse on

principle to minimizing taxes." [42] Moreover, while, as the court below pointed out (IV R. 1279), it is important under Section 104 not to confuse effect with purpose, the fact of large surtax savings by Prince was undoubtedly entitled to some weight. See *Helvering* v. *Nat. Grocery Co.*, 304 U. S. at p. 292.[43] It strains credulity to believe that Prince, perhaps not "averse on principle to minimizing taxes," would have failed to recognize that adherence to his plan of accumulation could more readily be achieved by accumulating the taxpayer's earnings free of taxes than by paying an individual surtax upon them.

Once the taxpayer is viewed in its true light, as the medium through which Prince used the earnings of the operating companies to buy up the

---

[42] There is nothing to indicate that the Board regarded the tax loss sales *per se* as instances of the use of the taxpayer to avoid surtaxes "through the medium of permitting its gains or profits to accumulate" within the meaning of Section 104 (III R. 946-948). Cf. *W. S. Farish & Co.* v. *Commissioner*, 38 B. T. A. 150, 155; affirmed, 104 F. 2d 833 (C. C. A. 5th).

[43] We submit that the Board of Tax Appeals correctly appraised the weight to be given such evidence when it said in the *Blaffer* case, 37 B. T. A. at p. 856:

"* * * In the absence of the condemned purpose, the effect alone is no foundation for the tax. This is not to say that the effect is of no significance, for it may, and perhaps often does, indicate the probability of a purpose to induce it. In ordinary life it is not unreasonable to infer that the effect of a voluntary act is among the purposes of the actor. So long as the inference be not arbitrary and evidence to the contrary be entertained and fairly weighed, it may be regarded as reasonable. * * *"

underlying shares of the enterprise, it becomes perfectly clear that no purpose peculiar to the taxpayer was served by having new purchases effected in its name rather than in the name of Prince individually. In these circumstances, any scheme of investment which partly dispensed with the payment of dividends necessarily carried with it a program of using amounts otherwise payable in surtaxes for the making of additional investments. See *Williams Inv. Co.* v. *United States*, 3 F. Supp. at p. 232. In judging the weight to be given denials of the condemned purpose, it was for the Board to take all the factors into account.

While expressing dissatisfaction, as we have indicated, with certain of the Board's subsidiary findings under this third point, the court below did not hold that the Board's ultimate finding of forbidden purpose, reached without the aid of the presumptions, lacked the support of substantial evidence. It was of the view, however, that the Board's ultimate finding here was predicated "chiefly" upon its findings that the taxpayer "was a mere holding or investment company" and that it "had accumulated its profits beyond the reasonable needs of the business, coupled with the fact that Prince saved a large amount of surtaxes by the withholding of further dividends." (IV R. 1295).

But the Board's finding, explicitly stated to have been reached without the aid of the presumptions, may not be so lightly cast aside. The taxpayer's huge accumulation of its earnings, Prince's use of these funds through the device of loans rather than dividends, his use of the taxpayer to effect paper transactions for tax loss purposes, the large amount of surtaxes which he saved—all afforded powerful support for the Board's finding of the condemned purpose. They were strongly persuasive, whatever the type of corporation involved, and whatever its reasonable business needs, objectively considered. Apart from the presumptions, they are sufficient to sustain the Board's determination, since they bear directly upon the reason for the accumulation.

While misconstruing the relation of the presumptions to the Board's determination reached without the aid of them, the court below would doubtless have affirmed the Board's decision had it agreed with the Board as to the nature of the taxpayer's activities. This is shown by the fact that, after a full review of the evidence, the court's disagreement with the Board derives from the substitution of its own appraisal of the evidence for that of the Board's on this issue (IV R. 1286–1287, 1290–1291, 1295). Accordingly, there is no occasion for the remanding of the case to the Circuit Court of Appeals for further consideration. Compare *Helvering* v. *Nat. Grocery*

Co., 304 U. S. at p. 295 with *Helvering* v. *Rankin*, 295 U. S. at pp. 133–134. The decision of the Circuit Court of Appeals should be reversed and that of the Board of Tax Appeals should be affirmed.

CONCLUSION

The Board's decision rested upon three independent grounds, and the court below erred in reversing the Board on each of those grounds.

(1) After reviewing the taxpayer's activities in great detail the Board found that it was a "mere holding or investment company" within the meaning of Section 104 (b). The court below rejected that determination, stating, "We do not think that this is a permissible finding on the record * * *" (IV R. 1285). On this aspect of the case, therefore, the court's ruling was based *solely* upon a disagreement with the Board as to a finding of fact which was supported by substantial evidence. And that finding was sufficient to dispose of the entire case; for it called into play the presumption established by Section 104 (b) which, the Board found, had not been rebutted. Accordingly, if this Court should conclude that the court below erred in rejecting the Board's finding that the taxpayer was a "mere holding or investment company," the court's decision must be reversed, and that of the Board affirmed.

(2) The Board also rested its decision on a second and wholly independent ground. It found

that the taxpayer "permitted its gains and profits to accumulate beyond the reasonable needs of its business" within the meaning of Section 104 (b); and that the presumption arising from that finding had not been rebutted. On this aspect of the case the Board assumed *arguendo* that the taxpayer was more than a mere holding or investment company. It found that, even considering the taxpayer as a management company, the accumulations were beyond the reasonable needs of its business. Moreover, even assuming that the taxpayer's business needs are those of the enterprise as a whole, the accumulation of earnings for the purpose of liquidating the Jersey Company and of transferring to the taxpayer ownership of the entire enterprise does not come within the scope of such needs. So far as the enterprise was concerned, it was of no moment whether the Jersey Company was liquidated or its stock was held by few or many. Prince's ambition to liquidate the Jersey Company and own the whole enterprise could not be transmuted into a business need either of the taxpayer or the enterprise. Holding that the Board had used a wrong "legal yardstick" in measuring the taxpayer's needs, the court ordered a remand so that the Board might determine whether the accumulations were necessary for the projected liquidation of the Jersey Company. This was a false issue, for the Board

had already correctly determined that the liquidation of the Jersey Company was not within the reasonable needs of the business.

(3) The Board finally found as a fact that, irrespective of either of the two foregoing findings which gave rise to the presumptions, the earnings of the taxpayer had been accumulated for the forbidden purpose. In refusing to accept that finding the court below stated that the Board's determination "was predicated chiefly" upon the two foregoing findings, which the court had already rejected (IV R. 1295). But the court seriously erred in this respect; for the Board unambiguously stated (III R. 945): "Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose." Accordingly, unless the veracity of this statement is to be challenged, the Board's decision must be viewed as resting independently upon this third alternative ground, which has powerful support in the record.

The court below erred in reversing the Board on each of the three grounds summarized above. Each of those grounds was sufficient, standing alone, to support the deficiency found by the Board. Accordingly, if this Court should agree that the court below erred on any one of those three grounds, the decision below must be reversed

with instructions to affirm the judgment of the Board.

Respectfully submitted.

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FEBRUARY 1943.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 104. ACCUMULATION OF SURPLUS TO EVADE SURTAXES.

(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax.

(c) As used in this section the term "net income" means the net income as defined in section 21, increased by the sum of the amount of the dividend deduction allowed under section 23 (p) and the amount of the interest on obligations of the United States issued after September 1, 1917, which would

be subject to tax in whole or in part in the hands of an individual owner.

(d) The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of the earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included.

The provisions of Section 104 of the Revenue Act of 1932, c. 209, 47 Stat. 169, are identical with those of Section 104 of the Revenue Act of 1928, except as subdivision (a) of Section 104 of the Revenue Act of 1932 was amended by Section 214 of the National Industrial Recovery Act, c. 90, 48 Stat. 195, which provides as follows:

SEC. 214. Section 104 of the Revenue Act of 1932 is amended by striking out the words "the surtax" wherever occurring in such section and inserting in lieu thereof "any internal-revenue tax." The heading of such section is amended by striking out "surtaxes" and inserting in lieu thereof "internal-revenue taxes." Section 13 (c) of such Act is amended by striking out "surtax" and inserting in lieu thereof "internal-revenue tax."

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 541. *Taxation of corporation utilized for evasion of surtax.*—Section 104 is designed to discourage the formation or use of a corporation for the purpose of preventing the imposition of surtaxes upon its shareholders, through the device of permitting its gains and profits to accumulate instead of being distributed. If a domestic or foreign corporation is so formed or availed of, it is subject to a tax at the rate of 50 percent upon its net income in addition to the tax imposed by section 13. However, the additional tax at the rate of 50 percent does not apply for 1928 or any subsequent taxable year if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive share, whether distributed or not, of the net income of the corporation for such year or years. Any amount so included in the gross income of a shareholder shall be treated as a dividend received, and any subsequent distribution made by the corporation out of the earnings or profits for such taxable years shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included.

ART. 542 (As amended by T. D. 4470, XIII-2 Cum. Bull. 151 (1934)). *Purpose to escape surtax.*—Prima facie evidence of a purpose to escape the surtax exists where a corporation is a mere investment company, where a corporation has practically no business except holding stocks, securities, or other property and collecting the income therefrom or investing therein, or where a corporation other than a mere hold-

ing or investment company permits its gains and profits to accumulate beyond the reasonable needs of the business. The statutory presumption that a mere holding or investment company is subject to the additional tax imposed by section 104 will be overcome if the corporation can show by a disclosure of all the facts that it was not formed or availed of for the purpose of avoiding the surtax, but the mere fact that it distributed a large portion of its earnings for the year in question is not sufficient to overcome the presumption.

The business of a corporation is not merely that which it has previously carried on, but includes in general any line of business which it may legitimately undertake. However, a radical change of business when a considerable surplus has been accumulated may afford evidence of a purpose to escape the surtax. When one corporation owns the stock of another corporation in the same or a related line of business and in effect operates the other corporation, the business of the latter may be considered in substance the business of the first corporation. Gains and profits of the first corporation put into the second through the purchase of stock or otherwise may therefore, if a subsidiary relationship is established, constitute employment of the income in its own business. To establish that the business of one corporation can be regarded as including the business of another it is ordinarily essential that the first corporation own substantially all of the stock of the second. Investment by a corporation of its income in stock and securities of another corporation is not without anything

further to be regarded as employment of the income in its business.

ART. 543 (As amended by T. D. 4470, *supra*). *Unreasonable accumulation of profits.*—An accumulation of gains and profits (including the undistributed earnings or profits of prior years) is unreasonable if it is not required for the purposes of the business, considering all the circumstances of the case. It is not intended, however, to prevent reasonable accumulations of surplus for the needs of the business. No attempt can be made to enumerate all the ways in which gains and profits of a corporation may be accumulated for the reasonable needs of the business. Distributions made by a corporation shortly after the close of its taxable year shall be taken into consideration in determining the reasonableness of the amount of earnings and profits accumulated by the corporation. Undistributed income is properly accumulated if invested in increased inventories or additions to plant reasonably needed by the business. It is properly accumulated if retained for working capital required by the business or in accordance with contract obligations placed to the credit of a sinking fund for the purpose of retiring bonds issued by the corporation. In the case of a banking institution the business of which is to receive and loan money, using capital, surplus, and deposits for that purpose, undistributed income actually represented by loans or reasonably retained for future loans is not accumulated beyond the reasonable needs of the business. The nature of the investment of gains and profits is immaterial if they are not in fact needed in the business. It is the unreasonable ac-

cumulation of gains and profits by a corporation which constitutes prima facie evidence of the purpose to enable its shareholders to escape the surtax. Among other things, the financial condition of the corporation and the manner in which it[s] funds are invested determine the reasonableness of the accumulations.

For the purpose of section 104 the term "net income" means the net income of the corporation as defined in section 21 increased by the sum of (1) the amount received as dividends and allowed as a deduction by section 23 (p), plus (2) the amount of interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner. The Commissioner, or any collector upon direction from the Commissioner, may require any corporation to furnish a statement of its accumulated gains and profits, the name and address of, and number of shares held by, each of its shareholders, and the amounts that would be payable to each, if the income of the corporation were distributed. (See section 149 (c).)

The like numbered articles of Treasury Regulations 77, promulgated under the Revenue Act of 1932, as amended by T. D. 4470, *supra,* are substantially identical with the foregoing.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942.

No. 488.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

CHICAGO STOCK YARDS COMPANY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.

The Facts.

In note 1 on page 5 of his petition, the Commissioner apprehends that the Taxpayer may not agree with his statement of the "important relevant facts." We do not believe that a brief in opposition is the place for a controversy about facts; but we emphatically do disagree with the Commissioner's summary. The factual summary made by the Circuit Court of Appeals in its opinion is better balanced, fairer, more complete and more accurate than the statement in the petitio (4R. 1267-1277).

II.

Under Rule 38 the Petition Should Not Be Granted.

The writ should be refused for the following reasons:

1. The Circuit Court of Appeals did not err in "overturning" the determination of the Board of Tax Appeals

that the taxpayer was a mere holding or investment company.

The Court, for the reasons set forth in its opinion (4 R 1285-1288), took the facts as found by the Board and merely decided that, *on those facts* the taxpayer was something more than a "mere holding or investment company," as that term is used in Sec. 104 of the Revenue Act.

The activities of the taxpayer were an issue for determination by the Board of Tax Appeals. Whether or not these activities made the taxpayer a "mere holding company" is open for determination by an appellate court. *Deputy v. DuPont*, 308 U. S. 488, 499; *Dunbar v. Commissioner*, 119 F. (2d) 367, C. C. A. 7; *U. S. v. Armature Rewinding Co.*, 124 F. (2d) 589, C. C. A. 8; *Magruder v. Washington, Baltimore and Annapolis Realty Corp.*, 316 U. S. 69; and *Helvering v. Price*, 309 U. S. 409.

It should also be noted that, in deciding this question as it did, the Court was acting in strict accordance with Art. 542 of Treasury Regulation 74 (promulgated under the Revenue Act of 1928) which appears in the Appendix, pages 24-26, of the petition. The attention of this Court is particularly called to the following passage in the Article just cited:

> "When one corporation owns the stock of another corporation in the same or a related line of business and in effect operates the other corporation, the business of the latter may be considered in substance the business of the first corporation. Gains and profits of the first corporation put into the second through the purchase of stock or otherwise may therefore, if a subsidiary relationship is established, constitute employment of the income in its own business. To establish that the business of one corporation can be regarded

as including the business of another it is ordinarily essential that the first corporation own substantially all of the stock of the second."

2. The Circuit Court of Appeals did not err in "overturning" the Board's determination that the taxpayer had accumulated its gains and profits beyond the reasonable needs of the business.

The Court, for the reasons set forth in its opinion (4 R 1290-1295), decided that the Board, in reaching this determination, used an improper "legal yardstick" by which to measure the business needs of the taxpayer. The Court itself made no findings of fact and no final disposition of the question. It merely construed the expression "reasonable needs of the business" as used in Section 104, and remanded the case to the Board to determine by the use of a proper "legal yardstick" whether or not the accumulations found by the Board were beyond the "reasonable needs of the business" as that expression is used in Sec. 104.

3. The Circuit Court of Appeals did not err in "overturning" the Board's determination that the taxpayer was availed of for the purpose of preventing the imposition of the surtax upon its stockholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed.

The Court did not "overturn" the Board's determination in this respect. While the Board observed in the course of its opinion that the decision might rest either upon the presumption or upon the record without benefit of the presumption, the Court held that the Board had based its decision chiefly upon subsidiary findings which as a matter of law were erroneous. The Court said:—

> "The Board's ultimate finding of forbidden purpose was predicated chiefly upon its findings that petitioner was a mere holding or investment company and that petitioner had accumulated its profits beyond the reasonable needs of the business, coupled with the fact that Prince saved a large amount of surtaxes by the withholding of further dividends." (4 R 1295.)

A reading of the entire opinion of the Board, we submit, amply justifies the Court's view. The Court then did not "overturn" the Board's decision. The Court recognized that the Board might or might not reach the same conclusion had it properly construed the applicable provisions of the Revenue Act. Accordingly, the Court limited its action to remanding the case to the Board to determine whether the ultimate finding of forbidden purpose can stand in the light of the Court's view of the law. That the opinion of the Court goes no further is clear from its final paragraph:—

> "Since we hold that the Board committed errors of law in arriving at its main subsidiary findings, upon which its ultimate inference of forbidden purpose chiefly rested, the case should be remanded to the Board for further consideraiton of its findings and decision in the light of this opinion. When all is said and done, the Board will have before it the ultimate question whether petitioner has sustained the burden of proving that the Commissioner's determination was wrong, that is, whether the Board is satisfied on a preponderance of the evidence that in Prince's decision on behalf of petitioner to distribute no more than $400,000 in dividends in each of the taxable years, the forbidden motive of surtax avoidance played no substantial part." (4 R 1296.)

It may further be observed that in the section of the opinion (3 R, p. 945) in which the Board purports to discuss the case without reference to the presumptions, no single fact is recited which could be a sufficient basis of inference when considered apart from these presumptions. Indeed no single fact in the whole case was so cogently persuasive on the taxpayer's behalf as "the organization of the petitioner"; for the petitioner (the present respondent) was organized in 1911 when there was no income tax to be avoided and not even a constitutional amendment authorizing one. Yet the fact of such organization is instanced by the Board as a basis of inference of a purpose to evade the tax.

If the Government really believed that the Board rested its opinion on the facts of the case aside from the presumptions it would not now be seeking to prevent reconsideration by the Board by applying for this writ. Quite obviously, the Board has been left free by the Court to draw again any legitimate inferences from the facts disclosed by the record.

4. The Circuit Court of Appeals did not err in its treatment of the "presumption" established by 104 (b).

The "presumption" in question is a statutory aid to the Commissioner in proving the existence of the interdicted purpose. The statute provides that a prima facie inference of such a purpose is to be drawn if either of two propositions has first been established. One of these is the proposition that the taxpayer is a mere holding or investment company. The other is the proposition that a corporation with a legitimate need for *some* accumulation has in fact accumulated beyond the reasonable needs of the business.

As to the first, it disappears from this case if (as we respectfully submit) the Circuit Court of Appeals was right in holding that the taxpayer is *not* a mere holding or investment company within the meaning of the Revenue Act.

As to the second, the Court has remanded the case with instructions respecting the proper yardstick by which to determine whether or not the accumulation was excessive. If the Board hereafter finds that it was *not*, the second basis of inference likewise disappears. If the Board finds the accumulation was unreasonably large, then the statutory presumption remains unimpaired by the Court's decision.

Whether the statutory presumption does or does not add much to the established practice which makes the Commissioner's determination of tax liability prima facie sound, is a purely academic question. The Commissioner himself must concede that the statutory presumption does not arise if it is determined that the taxpayer is not a mere holding company and that the accumulation is not excessive. It is the determination of this latter question which the Circuit Court of Appeals has referred back to the Board.

5. The Circuit Court of Appeals did not err in holding that the projected 1940 liquidation of the Jersey Co. coupled with acquisition of sufficient Jersey Common and Preferred stock to be able to control the liquidation was a reasonable need of the taxpayer's business.

The taxpayer (Pet. p. 6) "is the top holding company of what is referred to as the Chicago stockyards enterprise, a great integrated business owning or operating a stockyards, a belt line railway, an elevated street railway, a real estate development of considerable magnitude, power and

light facilities, a national bank serving the stockyard area and other related undertakings of lesser importance."

The Court, for the reasons set forth at length in its opinion (4 R 1291-1293), decided that plans for the liquidation of the Jersey Co. (an intermediate holding company which served no useful purpose) upon the termination of its charter in 1940, were within the scope of the "reasonable needs of the business" of the respondent, as that term was used in Section 104. When the facts are understood, and stated simply, this proposition becomes self-evident. Indeed, the proposition was unanimously accepted by the three witnesses called by the Government. All of them testified that if they had been on the taxpayer's Board of Directors they would have planned for the liquidation and would have accumulated gains and profits for that precise purpose and would have done so during the years in question. (2 R 700, 703) (2 R 802) (2 R 842, 848).

6. The Circuit Court of Appeals did not remand the case upon a false issue.

On the contrary, the Court directed the Board to determine the very question which the statute and the Commissioner's ruling directly and necessarily raised, viz., whether, in the taxpayer's decision to accumulate its income in excess of the substantial dividends it paid, the purpose of tax evasion played any substantial part.

The qualifying word "substantial" was used advisedly by the Court in interpreting the intention of Congress. That there had been no doubt in the mind of the Board that the taxpayer's actual purpose in accumulating income was an honest one is made evident by the following quotations from the record of statements made by the writer of the majority opinion:

"I might state at this point that I never had any doubt from the testimony in this case, that Mr. Prince and the others in authority here had an expectation all during the years 1920 to 1933 inclusive, to liquidate the Jersey Company. I think that the testimony warrants that, but was not the basis of any conclusion that I reached. • • •

"I could not find from the record any evidence that the Maine corporation had any purpose except the purpose of Prince, and the company could not have, the corporation can't have, a purpose except the purpose of its officers or directors, and I have no doubt that Prince had the idea, I think it was plain all through this testimony, that it was his idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares to pay off not only all of the bonds of the Jersey Company in or before 1940 but all of the indebtedness of all of the other corporations." (3 R 1072, 1073.)

The mistake of law made by the Board on this vital matter was to substitute for an actual and honest business purpose a hypothetical and fabricated purpose of tax evasion without even suggesting that this hypothetical purpose had played a substantial part in determining the taxpayer's policy.

The Circuit Court of Appeals, as appears from its opinion (4 R 1279-1281) gave full recognition to the rule, as established by this Court, that it is the function of the Board, not the Circuit Court of Appeals, to draw inferences from the facts and to choose between conflicting inferences. This is because one of the Board's functions is that of a trier of facts. But the Board acts not merely as

a jury: it also has a judicial function. In its capacity as judge it in effect instructed itself as follows:

> 1. I instruct you as a matter of law that the taxpayer is a mere holding or investment company. From that you may infer that it had the forbidden purpose.
>
> 2. I instruct you as a matter of law that the taxpayer had no reasonable need to accumulate. It did accumulate and from that you may infer that it had the forbidden purpose.

The Circuit Court of Appeals perceived that these instructions as to matters of law were error and it remanded the case to the Board solely on the ground that, on the basis of the facts found by the Board, the Board on a proper construction of Sec. 104 committed errors of law. Accordingly, the question before this Court (in case the writ is granted) will be whether the Circuit Court of Appeals correctly interpreted an Act of Congress in the light of undisputed facts. It will not be the question (as the Commissioner would like to have it appear) whether the Circuit Court of Appeals may properly "overturn" a finding of fact by the Board of Tax Appeals.

III.

The Judgment of the C. C. A. Averted a Grave Injustice.

All of the foregoing is pointed to Rule 38 of this Court to show that, under this Rule, the writ should not be granted. If, however, it is within the power of a litigant to do so by concession, the taxpayer is willing to enlarge the operation of the Rule so that certiorari will be granted in this case, if, upon an examination of the whole record,

it appears that the decision of the Court below has resulted in a miscarriage of justice. It is confidently submitted that far from resulting in such a miscarriage, the decision of the Court below actually prevented one.

The taxpayer advanced three propositions before the Board of Tax Appeals as follows: (1) The taxpayer is not a mere holding or investment company. (2) It had a business need to accumulate and it did not accumulate beyond the needs of that business. (3) Its purpose in accumulating was to liquidate the Jersey Company and not to avoid surtaxes.

The Board of Tax Appeals found all the essential facts in respect to proposition (1), then measured them against the Revenue Act and concluded "that the petitioner is a mere holding or investment company." Its measurement was faulty. The Circuit Court of Appeals perceived that the measurement was wrong and overturned the Board. Certainly this was not a miscarriage of justice.

On the second proposition the Board found all the facts and concluded that the taxpayer could not legally have any need whatsoever to accumulate. Without in any sense disturbing the findings of fact, the Circuit Court ruled that the Board on these facts had through error of law reached the wrong conclusion and again overturned the Board. Here again was no miscarriage of justice.

As to the third proposition, the Circuit Court, having learned from the Record that the actual purpose with which the accumulations were made was the liquidation of the Jersey Company and not the avoidance of surtaxes, naturally felt that there must be something seriously wrong in the thinking of a Board which clearly perceived that there was no actual purpose to avoid surtaxes, then fabri-

cated a constructive purpose and imposed the tax. The wrong thinking that had been done was obvious. It lay in thinking that the taxpayer was a mere holding or investment company and a company that simply could not have a need to accumulate. All that the Circuit Court of Appeals did was to correct the erroneous view of the law which the Board held and send the case back with instructions to think about it again and this time to think straight.

Certainly this taxpayer was entitled to have its case determined by a Board prepared to start its thinking about the case on the basis that a company which dominated and directed every important act of this great integrated enterprise was something more than a mere holding or investment company. Certainly this taxpayer was entitled to have its case determined by a Board prepared to start its thinking on the basis that this company had business needs greater than the need to possess a pair of scissors to cut coupons and a pen with which to endorse dividend checks. Can it seriously be urged that there is any miscarriage of justice in sending the case back to the Board for fresh consideration by it but this time with instructions to search for the actual and substantial purpose and not a fabricated or constructive one, and to begin that search without first having made two devastatingly erroneous rulings of law?

Unless the case is sent back, the taxpayer will find itself in the unhappy position of having had its case decided by a Board which failed to perceive that a corporation actually formed for the purpose of operating a great integrated enterprise and which did this for 30 years was not a "mere holding or investment company" having "no need for the accumulation of gains and profits." (R Vol. IV,

1286, 1287.) Such a result would, indeed, be a miscarriag of justice.

Respectfully submitted:

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1942.

No. 488.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

CHICAGO STOCK YARDS COMPANY.

Brief for the Respondent

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CHICAGO STOCK YARDS COMPANY.

RESPONDENT'S BRIEF.

I.

QUESTIONS PRESENTED.

Did the Circuit Court of Appeals err in deciding:—

1. That, on the facts found by the Board of Tax Appeals, the taxpayer (respondent) was not "a mere holding or investment company" within the meaning of the Act of Congress but was, on the contrary, a top holding company which managed and financed the business of a great integrated enterprise and that therefore the Board, in determining whether the accumulation permitted by the taxpayer was or was not excessive, should use as a measure the needs of the integrated enterprise as a whole as distinguished from using as a measure the non-existent business needs of a mere holding or investment company.

2. That since the main reliance of the Board, in reaching its original conclusion, was its erroneous conception of the measure by which to determine the propriety of the accumulation, it was only fair to remand the case for

reconsideration by the Board and for the final decision by it of the ultimate question, i. e. whether that tribunal is satisfied, on a preponderance of the evidence, that in the decision to distribute no more than $400,000 in each of the tax years the forbidden motive of surtax avoidance played no substantial part.

II.

STATEMENT.

There is no factual dispute between the parties.[1] Such of the facts as are stated in the petitioner's brief find support in the record, although so marshalled as to do less than justice to the position of the Circuit Court of Appeals. Most of them are relevant only to the question whether or not the taxpayer was guilty of a purpose to evade—which is the ultimate question sent back for future determination by the Board of Tax Appeals. Wherever in the course of respondent's argument facts additional to those stated by the petitioner are relied upon, appropriate references to the record will be inserted.

---

[1] On page 6 of the Commissioner's petition for the writ, the government itself says "The taxpayer is the top holding company of . . . a great integrated business owning or operating a stockyard, a belt line railway, an elevated street railway, a real estate development of considerable magnitude, power and light facilities, a national bank serving the stockyard area, and other related undertakings of lesser importance"; and annexes the chart adopted by the Court below, and a copy of which is attached at the end of this brief.

III.
ARGUMENT.

1. Summary of Argument.

The size of the record, the number of exhibits and the length of the petitioner's able brief give the impression that this Court is now being asked to consider complicated and disputable matters of fact. This, the taxpayer suggests, is a misapprehension.

In final analysis the problem now presented for solution is merely whether the Court below erred in remanding the case to the Board of Tax Appeals for the determination by it of an ultimate question of fact; the determination to be made by the Board in the light of a correction made by the Circuit Court of Appeals of what the Court regarded as an erroneous conception entertained by the Board of the meaning of Section 104 of the Revenue Act of 1928 as applied to the undisputed facts in this case.*

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* "SEC. 104. ACCUMULATION OF SURPLUS TO EVADE SURTAXES.

"(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

"(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax."

If the judgment of the Court below is affirmed it will be because this Court approves the interpretation of the Act of Congress as made by the Circuit Court of Appeals. In that event it will become the duty of the Board of Tax Appeals to give a final answer to the ultimate question of fact, i. e., "Did the taxpayer accumulate gains and profits during the three tax years and if so did the forbidden motive of tax avoidance play a substantial part in determining the taxpayer's motive for making the accumulation?"

On the original hearing this question was answered by the Board adversely to the respondent. The Board gave this answer after first deciding that the statutory term "mere holding or investment company" was intended by Congress to apply to such a corporation as the record discloses the taxpayer to be. Having thus classified the taxpayer, the way was open for the Board to find that a mere holding or investment company has no legitimate business need for any accumulation whatever; that the accumulation in fact made by the taxpayer was therefore unreasonable; and that there was no assignable reason for it except the motive to evade surtaxes.

By thus classifying the taxpayer, the Board gained the support of the two statutory presumptions which Congress has provided to facilitate proof of the interdicted purpose—one, the presumption arising from the absence of any corporate activity except investment; and the other from the existence of an accumulation unreasonably large with relation to the needs of "the business."

The Circuit Court of Appeals on the other hand conceived that Congress, when it used the words "mere holding or investment company," did not mean that a corporation like the taxpayer is to be treated as if it existed in a

vacuum, but rather in the economic setting disclosed by the facts found by the Board—as an essential part of a great integrated industrial enterprise; and that when so viewed its business and business needs must be considered in the light of the position it occupies in the enterprise. Its holdings in subsidiaries which are parts of the enterprise are more than just "investments"; "loans" made for the purpose of protecting different units of the enterprise are different from distributions to Mr. Prince in the guise of loans; and the business needs of the taxpayer are co-extensive with the business needs of the enterprise. It is then no longer possible to view the taxpayer as a "mere holding or investment company." It is not like the Massachusetts Investors Trust, but, like the American Telephone & Telegraph Company, is a directing force and financial department of a large integrated industrial enterprise which may have needs justifying accumulations of earnings by the department which functions as the treasury of the enterprise.

While the Board (as an alternative ground of decision) purported to decide the case without the aid of the statutory presumptions it made no specific findings of fact as to the actual existence of the condemned purpose from which, independently of them, its conclusions could be drawn; and the Circuit Court of Appeals was of opinion that these presumptions, found to exist by an erroneous conception of the law, had so preoccupied and influenced the Board as to entitle the taxpayer, in the interest of fairness and justice, to a new trial freed from such error.

The taxpayer now submits two contentions for the consideration of this Court:—

1. That the Circuit Court of Appeals was right in reversing the Board on its interpretation of the Act and

in deciding that upon the undisputed facts (stated and discussed in the brief) the taxpayer is not a mere holding or investment company having no business need for any accumulation, and that the proper measure of the controverted accumulation is the aggregate business need of the entire integrated enterprise which the taxpayer financed and managed.

2. That on the ultimate question of fact (i. e., the existence or non-existence of the forbidden purpose) the Circuit Court of Appeals by no means substituted its judgment for that of the Board but properly exercised the familiar judicial discretion to order a new trial by the trier of facts, unembarrassed by the errors which had prevented the first trial from being fair to the taxpayer.

If this Court approves the decision of the Court below respecting the nature and function of the taxpayer the only question for present decision is a procedural question, i. e., whether a new trial before the Board shall be permitted to proceed as ordered or whether this Court will overrule the discretion of the Court below in holding that the needs of justice require such a new trial to be had.

The taxpayer respectfully submits the argument which follows in support of the contention that the Court below committed no error and that its judgment on all points should be affirmed. In the course of the argument the respondent will answer the petitioner's contention that the classification of the respondent as a mere holding or investment company is an unreviewable determination of a matter of fact.*

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*See Infra, page 20.

The answer will be to the effect that the judicial power of the United States is properly exercised when this Court supplies an administrative tribunal with an authoritative interpretation of a statutory formula. When the formula has thus been authoritatively interpreted, the administrative tribunal is thereafter left free to apply it to the varying fact situations which present themselves. The instant case is the first in which this Court has been called upon authoritatively to declare the meaning of the statutory phrase "a mere holding or investment company."

2. The Facts Emphasized by Respondent.

The three tax years are 1930, 1932 and 1933. Long before these years and during all three of them the taxpayer was entitled by contract to receive and did receive substantially all the earnings of the operating subsidiaries in the Stock Yards enterprise. The stock of one important and of two unimportant subsidiaries was directly owned by the taxpayer (3 R 902-913). The stock of the other subsidiaries was owned by the Jersey Company which was itself controlled by the taxpayer through stock ownership. The income of the taxpayer was derived almost entirely from earnings of the subsidiaries which found their way into the taxpayer's treasury. The taxpayer, beginning in 1911, planned to accumulate these earnings (after paying reasonable dividends which for many years prior to 1930 had been at the rate of 5%) to the extent necessary to liquidate the Jersey Co. and pay off its securities held by the public when its charter should expire in 1940 and in the meantime to meet the financial requirements of the several subsidiaries which otherwise would have been helpless as a result of the liberal dividend policy imposed upon them in the exercise of the taxpayer's ultimate power of control

(3 R 926-7; 930; 942-3). By the By-Pass agreement made October 1, 1914,[1] between the taxpayer and the Jersey Co. the earnings of these subsidiaries, after paying a dividend of 6% on Jersey preferred shares and 9% on Jersey common shares owned by the public, flowed automatically and directly into the treasury of the taxpayer (3 R 908). By thus absorbing all the net earnings of its subsidiaries the taxpayer necessarily subjected itself to an obligation to protect all of their securities outstanding in the hands of the public.[2]

Thus the taxpayer, having absorbed the earnings of the subsidiaries, properly accepted the resulting responsibility to supply their financial needs, including provision for the ultimate payment of all their obligations.

The Circuit Court of Appeals decided that the expression "mere holding or investment company" as used in the Act of Congress, was never intended to apply to a company with activities such as these and held that the taxpayer was far more than a "mere holding or investment company." In a later part of this brief [3] we present our reasons for thinking that the Circuit Court of Appeals was right. At this stage of the argument we merely assume the soundness of the decision and proceed to a statement of the facts which, on that assumption, are of controlling significance.

A. Over-all View of the Three Tax Years.

Consider first, if the Court please, the situation at the beginning of the first of the three tax years.

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[1] This so-called "By-Pass Agreement" (Ex. S-46) is scarcely mentioned by the petitioner but is regarded by the taxpayer as having the significance above attributed to it, and is printed at the end of this brief.

[2] See infra pages 31-33.

[3] See infra pages 19-20.

By January 1, 1930 the taxpayer had accumulated in its treasury liquid assets of about $12,000,000. Obligations of the Enterprise which, if the plan of liquidation were carried out, had to be paid off by 1940, amounted to over $30,000,000. The other units of the enterprise had a total of liquid assets scattered among them of about $9,600,000 of which over $2,000,000 were impounded in court pending the decision of a case. The enterprise needed a minimum liquid working capital of $5,000,000.

Consider, next, the situation at the close of the three-year period.

At the end of 1933, the net liquid position of the enterprise as a whole was $1,000,000 less favorable than on January 1, 1930; obligations had declined by about $3,000,000, but liquid assets had declined about $4,000,000. This was chiefly due to the necessity for using funds to save the Stock Yards' Banks in 1932 and 1933.[1] But the liquid assets of the enterprise were less equally divided between the taxpayer and the other units. The liquid assets of the taxpayer *increased* by about $2,000,000 to about $14,000,000; while those of the rest of the enterprise *decreased* by about $5,800,000 to about $3,800,000 (Resp Ex C pages headed 1929-1933).

This was in line with the policy which the taxpayer had followed for years of having the subsidiaries make dividend distributions in excess of their earnings in order to build up the treasury of the taxpayer as originally planned. Thus in 1933 when the enterprise as a whole had earnings of only $185,000, the taxpayer withdrew over $2,000,000 from the other units as dividends.

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[1] See infra, p. 17.

If surtax evasion had been in the mind of the taxpayer, none of the subsidiaries would have declared any dividends during this period and the income of the taxpayer would have been immensely reduced. In at least one year—1933—the taxpayer's income would have been less than the dividends which it actually paid. For years the taxpayer, as the treasury department of the enterprise and in accordance with the plan, filled its own treasury from the Jersey Company and the subsidiaries, withdrawing all their current earnings and more. How simple it would have been to escape surtax, if that were in the mind of the taxpayer, by allowing funds to accumulate in the treasury of the Jersey Company so that that company, rather than the taxpayer, would be in a position to meet the Jersey obligations.

As a matter of fact, during this period of four years, after paying the dividends which it paid and after sinking the funds which it did in saving the banks, the enterprise accumulated no funds available for further distribution as dividends. During this period the enterprise earned $12,170,933.72 (3 R 921) out of which it paid as dividends to public shareholders of the Jersey Co. stock $1,734,000 (3 R 922) and as dividends to holders of stock of the Maine Co. $1,600,000 (3 R 918)—a total distribution in dividends of $3,334,000. This left income available for distribution of $8,836,933.72; but during this period $12,833,633.61 (3 R 912, 914-5) was poured into the Stock Yards banks in the form of cash and either promptly lost or frozen.

Following this "over-all view" of the tax period the Court is asked to consider the three years one by one.

B. The Tax Year 1930.

The course of corporate conduct consistently followed by taxpayer had resulted in the following financial situation when 1930 began (3 R 914. Resp Ex C page headed 1929):—

The aggregate bonded indebtedness of the taxpayer and of all subsidiaries was	$23,963,000.00
The aggregate of available liquid assets was	$16,705,185.06*
Leaving an excess of bonded debt over available liquid assets of	$ 7,257,814.94

Included in these liquid assets were the securities in the portfolio of taxpayer purchased out of the earnings of the subsidiaries and held for the ultimate liquidation of the Jersey Company and (in the interval) for meeting the needs of the subsidiaries. These securities were, to the extent of over 94%, the shares of corporations within the limits of the integrated enterprise which the taxpayer was managing and financing (3 R 919, 939). The income of the taxpayer from investments for 1929 amounted to $2,651,739.24 (3 R 940). Of this amount $27,742.75, or only 1.047% came from outside investments (3 R 939-40). The accumulation in the taxpayer's treasury on December 31, 1929 was about $12,000,000.00 (3 R 914).

If (as is so uniformly contended by the Commissioner in tax cases involving a series of years) each year is considered by itself, it will be for the Board to decide, under

* After reserving $5,000,000 for working capital (1 R 298; 2 R 852).

the instructions of the Circuit Court of Appeals, whether the interdicted purpose substantially influenced in 1930 the course which was in fact followed.

The specific business problem which confronted the taxpayer in 1930 was the extent of the profit distribution which the Chicago Enterprise as a whole might safely make in that year through the medium of a dividend declaration by the taxpayer.

It was, we submit, no time to take chances. In the previous October the financial crisis had been precipitated. Four of the leading banking houses of Boston had failed. There was a panic there as well as on the New York Stock Exchange. The problem before practically every bank and business corporation was not how to reduce taxes but how to avoid utter collapse. No prudent board of directors in any corporatoin of any sort would have chosen 1930 as the year in which to *increase* the customary dividend.

Assume that on December 31, 1930 the Board of Directors of the taxpayer, after having declared and paid a 5% dividend, had met to consider an extra dividend. Assume also that they then left out of consideration any further accumulation to retire the shares (preferred or common) of the Jersey Company and merely figured on the relation of presently available liquid assets of the entire enterprise to the bonded indebtedness thereof. In other words, assume that they abandoned the original Prince-Armour plan of ultimately acquiring sole ownership for themselves and that they looked forward to liquidation in 1940 for the benefit of whomever might then be the shareholders of the Jersey Company. On these assumptions the figures confronting them (after reserving $5,000,000 as necessary working capital) were these (Resp Ex C page headed 1930):—

Bonded Indebtedness	$22,379,000.00
Available Liquid Assets	17,933,683.98*
Leaving an excess of bonded debt over available liquid assets of	$ 4,445,316.02

During the year, pursuant to the original Prince-Armour plan, they had accomplished a reduction of bonded indebtedness of approximately a million and a half dollars and they had bought for the taxpayer some 190 shares of Jersey preferred and 253 shares of Jersey common (3 R 927). This left them with net earnings in excess of a million dollars, which, while in itself an immense sum, was small in relation to the contingent needs of the business as a whole. The directors decided not to distribute this or any part of it by way of extra dividend. If they could actually have foreseen what was to happen in the later tax years, this decision would have been reached without a moment's debate. But even as it was, with the country's financial situation in 1929 and 1930 immediately behind them, we earnestly submit that sound business policy required them to decide as they did.

This contention, the Court will observe, is based upon the assumption (made for the sake of the argument) that the original plan of accumulation was so far modified as to drop out of consideration the buying up of all outstanding Jersey stock. It is based further (likewise for the sake of the argument) on acceptance of the view of the Government experts that such acquisitions, if they were thereafter to be made, might be made with borrowed money; or, if not made by the taxpayer, might or might not be made

* Includes impounded charges of $2,013,523.24 which were not released to the Transit Co. until 1932 (3 R 914).

by Prince out of his separate estate. The contention is merely this: that on December 31, 1930, looking at the enterprise as a whole and with a deficiency of liquid assets of $4,000,000 below bonded indebtedness, the taxpayer should have an opportunity to urge upon the Board that no inference of tax evasion should be drawn from the decision not to declare an extra dividend.

If this be so, without reference to outstanding Jersey preferred, let the picture be changed by taking that factor into consideration. The preferred was entitled to preference in liquidation and must be taken care of just as much as bonded debt. Of these preferred shares 64,353 were outstanding at the end of 1930 (Resp Ex C page headed 1930). Their liquidation value at par was $6,435,300.00. So that (still without reference to any further acquisition of common) the excess over liquid assets of what, for purposes of liquidation, were obligations ahead of common was more than ten million dollars.

We respectfully submit that it is only fair to allow the Board to consider whether, in such a picture, the shadow of an illicit purpose is discernible.

C. The Tax Year 1932.

We next ask the attention of the Court to the second of the three tax years.

Let it be supposed that the directors of the taxpayer had met on the last day of that year (1932) to consider whether or not the financial situation of the enterprise justified an extra dividend. The regular dividend of $400,000 had been declared during the course of the year (3 R 918).

The figures respecting the entire enterprise submitted by the treasurer would have shown the following (Resp Ex C page headed 1932):—

Bonded Debt	$21,434,000.00
Available Liquid Assets	14,849,691.09*
Leaving an excess of bonded debt over available liquid assets of	$ 6,584,308.91

During the year the bonded debt had been reduced by $672,500.00. Pursuant to the original plan, 302 shares of Jersey preferred had been bought and 380 shares of Jersey common (3 R 928). The taxpayer had sucked up into its treasury income from other units of $2,196,614.10 (Ex S51; 3 R 921); but it had poured or caused other units to pour cash as follows into banks to prevent failures which would have meant disaster to the Stock Yards' enterprise (3 R 914-915):—

The Maine Company (respondent)	$3,071,779.18
The Central Mfg. District	501,439.58
The Transit Company	1,340,000.00
The Produce Terminal	350,000.00
Making a total for the year of	$5,263,218.76

The problem of the directors, therefore, was whether to ignore the situation of the enterprise as a whole or to think realistically and so conserve the net income on the books of the taxpayer to help bridge the gap between a bonded debt of twenty-one millions and available liquid assets of only two-thirds of that sum—a gap which had grown wider during the preceding twelve-month.

*After reserving $500,000 for working capital.

In thus stating their problem we are again (as in 1930—and merely for the purposes of the argument) leaving out of the picture further accumulation for the retirement of stock. Even on this assumption we submit that it would have been sheer folly to declare an extra dividend on taxpayer's stock when the earnings of the enterprise as a whole had been assembled in the interest of its own self-preservation and when every dollar of net income seemed likely to be needed before the financial storm had passed.

If, as before, we bring the then outstanding Jersey preferred into the picture the soundness of the directors' decision becomes even clearer. There were 63,435 shares of preferred then outstanding which, like the bonded debts, were essential elements in the liquidation problem. (Resp Ex C page headed 1932.) If their par value be included in determining the excess of "liquidation liabilities" over available assets the excess of liabilities would be $12,927,808.91. With liquidation only eight years away and an unpredictable financial condition in the interval, we submit that it should be left to the Board to determine whether the business reason for declaring no extra dividend was not so compelling as to deprive the suggestion of tax-evasion of all weight.

D. The Tax Year 1933.

Had the directors of the taxpayer met on December 31, 1933, nobody fit to be a director would even have considered an extra dividend.

The bonded debt as of that date was..	$21,197,000.00
The available liquid assets were.....	12,829,969.74*
Leaving a deficiency for liquidation purposes of	8,367,030.26

(Resp Ex C page headed 1933.)

*After reserving $500,000 for working capital.

During the year the bonded debt had been reduced by $237,000.00, and 797 shares of Jersey preferred and 357 shares of Jersey common had been bought (3 R 928). The item of net income on the taxpayer's books *appeared* to be large ($2,243,840.98) (3 R 921); but in order to make this showing the taxpayer had sucked up from the Transit Company $1,716,000.00, which Company in that year had suffered an actual loss of $827,463.49 (3 R 922), and from the Produce Terminal Company $200,000.00, although its net income for the year was only $29,850.39 (3 R 923). The operating loss of the Transit Company was due to the fact that under the management of the taxpayer it had poured into banks to avert failure and had lost no less than $1,016,414.84 (3 R 915). Looking at a consolidated balance sheet of the whole enterprise the directors would have found a net income of only $185,996 (3 R 921).

But even this was not the whole story. To save Stock Yards' banks from failing and in a successful attempt to stop "runs", the following deposits in such banks had been voluntarily subordinated to the claims of other depositors (3 R 914-915):—

The Taxpayer	$1,800,000.00
The Transit Co.	1,300,000.00
The Produce Terminal	300,000.00
The District	600,000.00
Making an aggregate of	$4,000,000.00

For a similar purpose a subscription to the capital stock of a new Stock Yards Bank had been made during the year by the taxpayer in the sum of $1,500,000.00 (3 R 912). By the end of 1933, therefore, the directors would have been

faced by a tie-up of funds of nearly thirteen million dollars as the result of a successful effort to prevent bank disasters, a portion of which total had by that time already become a loss. There were then outstanding Jersey preferred shares of the par value of $6,236,880.00 (Resp Ex C page headed 1933). With these "liquidation liabilities" included in the picture there was an excess of such liabilities over available liquid assets of $14,603,910.26. The Court will have it in mind that in addition to the dividend of $400,000 (3 R 918) declared by the directors of taxpayer during 1933 there had also been distributed by the Jersey Company from its net income $425,412 (3 R 922) by way of dividend on such securities as were held by the public. This means that during the year in question there had actually been distributed by the taxpayer and by the Jersey Company $825,412. We press the suggestion that with aggregate net earnings of $185,996 (3 R 921) for the whole enterprise and a deficiency of assets for liquidation purposes of more than $14,000,000 the declaration on December 31, 1933 of a dividend additional to the $825,000 already distributed would have been the act of financial gamblers.

We accordingly submit that the taxpayer is fairly entitled to have its case further considered by the Board. The Board, upon such reconsideration, will be in a position to determine whether on such a record there should be imputed to the taxpayer a motive of tax evasion or whether the existence of such a motive is affirmatively disproved by the act of the taxpayer in thus sucking up funds from subsidiaries. The Board will consider whether, if there had been any thought of tax evasion, the funds of subsidiaries would not have been allowed to remain in their several treasuries so that the taxpayer would have

had no net income in excess of its usual dividend requirements. The Board may conclude that what on the first trial it subconsciously did was to read back into the tax years the later Personal Holding Company statutes which ignore motive and make the mere *fact* of accumulation decisive. Had these acts been in force during the tax years and if the taxpayer had desired to reduce surtaxes, it would not have followed the plan actually followed of assembling all funds in a central treasury against the arrival of the liquidation date.

It is respectfully submitted that a review of the three tax years considered together and of each considered separately leads to the conclusion that the Court below was doing no more than justice when it remanded the case for reconsideration by the Board unembarrassed by what the Circuit Court of Appeals regarded as the erroneous conception of the taxpayer's place in the Stock Yards' Enterprise.

3. Propositions Relied Upon by Respondent.

(1) Taxpayer Is Not a "Mere Holding or Investment Co."

Up to this point it has been assumed in this brief that the Court below was right in holding that the taxpayer was much more than a mere holding or investment company within the meaning of the Revenue Act.

The importance of the point is obviously great; because if the taxpayer were such a company as the Board held it to be, it would have had no need for any accumulation whatever. As there was in fact a large accumulation at the beginning of the tax period and as, during that period,

only a part of its income was distributed, there was (on the Board's theory) no business need which the taxpayer could advance to overcome the statutory inference of a forbidden purpose. There being no good reason for *any* accumulation, the existence of *some* accumulation was, the Board argued, persuasive evidence of a purpose to evade. On the other hand, if the case were to be submitted to the Board free from the erroneous ruling that the taxpayer was a mere holding or investment company having no business needs, it would be the function of the Board to recognize the propriety of *some* accumulation and then to determine whether the accumulation in fact made during the tax years was to a substantial degree motivated by a purpose to reduce surtaxes.

(a) The Judicial Power of the United States may properly be exercised in reviewing the interpretation placed by the Board of Tax Appeals upon statutory language.

At this point we meet and answer the petitioner's contention that the decision of the Board on the meaning of the Act of Congress is not subject to judicial review. The taxpayer now urges upon the Court an entirely different conception of the judicial function.

We submit that any abstract discussion of the difference between fact and law is here unnecessary in view of the wise policy of this Court always to make an authoritative statement of the meaning of a statutory phrase for the guidance of administrative tribunals in reaching their subsequent determinations. There has hitherto been no such statement by this Court of the meaning of the phrase "mere holding or investment company," although the need for clarification is obvious when the Board says it means one thing and the Circuit Court of Appeals says it means an-

other. Surely both the Government and the taxpayer are entitled to an exercise of the judicial power of the United States for the determination of an issue respecting the true intent and meaning of a statute.

If the Court approves this approach to the problem it will be following the course of its decisions in the case of analogous statutory declarations.

Thus in determining the meaning of "a gift in contemplation of death" this Court did not hesitate to review (at the instance of the Government) a finding of the Court of Claims on that point. While the appeal was disposed of on other grounds, this Court made it clear that the finding was by no means unreviewable and made its authoritative declaration accordingly. *U. S. v. Wells*, 283 U. S. 102 (1931). This declaration thus became the norm for the determination of other cases, as appears from *Colorado National Bank v. Commissioner*, 305 U. S. 23 (1938) in which case the Board of Tax Appeals had held that the transfer "was not made in contemplation of death within the meaning of the statute as explained in *U. S. v. Wells.*"

The same course has been followed in other instances; in *Deputy v. duPont*, 308 U. S. 488 (1940) and *Magruder v. Realty Corp.*, 316 U. S. 69 (1942) respecting the meaning of "ordinary and necessary expenses" and "carrying on or doing business"; in *Helvering v. Price*, 309 U. S. 409 (1940) respecting a provision of the Revenue Act governing deduction of losses; and in *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 489 (1942) respecting the interpretation of statutory standards by the Interstate Commerce Commission. Another case in which an authoritative interpretation will be needed is the statutory use of the word "beneficiaries" in Sec. 503 (a) (1) of the Code which was

considered by the Board of Tax Appeals (now the Tax Court) in *Steuben Securities Corporation v. Commonwealth*, decided January 5, 1943. The course now advocated was also followed by this Court in *S. E. C. v. Chenery Corp.* (decided February 1, 1943) respecting the meaning of the phrases "fair and equitable" and "detrimental to the interests of investors." In the case last cited this Court observed (page 11 of slip opinion):

> "if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law . . . We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

(b) The facts which give rise to the problem of interpretation.

A very brief restatement of significant facts will enable the Court to appreciate the strength of the position taken by the Court below on this phase of the case.

By 1911, when the taxpayer was organized, the Chicago Stock Yards was a great industrial enterprise, owning or operating a stock yard, belt line railway, real estate developments, elevated street railway, power and light facilities, etc. This enterprise had started in 1865 as one corporation, but for economic and legal reasons, had been split into several organizations and corporations, all of which were tied together by the Jersey Company, which was a parent corporation, holding the stock of the subsidiaries and financing, operating and managing them (3 R 902-906). Corporate organizations were multiplied but the business remained unitary.

The success of the enterprise was dependent upon the continued location of the slaughter houses of the packers in the vicinity of the yards. In 1890, the packers threatened to move away, with consequent ruin to the enterprise, unless they received a substantial payment for staying. F. H. Prince and associates of his formed the Jersey Company to raise funds to make this payment, which the Transit Company (the only operating company) was unable to do itself. He was successful, and contracts were entered into by the packers in which they promised to keep their slaughter houses in the vicinity of the yards until 1906 as to some and 1907 as to others (3 R 902-3). When these contracts expired, the packers renewed their threats (3 R 906).

(c) The taxpayer and the plan it was formed to execute.

After long negotiations had taken place, Mr. Prince evolved a simple and brilliant plan to eliminate this threat and thus to safeguard interests of the stockholders of the Jersey Company and, at the same time, if the plan worked out, to make a profit for himself. He reasoned that if at least one of the principal packers had a permanent interest in the enterprise, the packer threat would no longer exist. He sold his idea to Armour, one of the packers. (3 R 906.)

At that time the Jersey Company was substantially in debt. It had issued $14,000,000 of bonds, secured by all of the stock of the Railway Company, substantially all of the stock of the Transit Company (from which two corporations it derived nearly all of its income) and $2,500,000 of securities the Jersey Company owned. (1 R 46-47; 52-53; Ex S24.) The Jersey Company had outstanding $6,500,000 6% preferred stock and $6,500,000 common stock (3 R 903). Each share of each class had a par of $100 and was entitled to vote (3 R 903).

The plan was as follows:—

Prince and Armour formed a new corporation—the taxpayer—with a cash capital of $1,000,000. Prince owned 80.6% of the stock and Armour 19.4%. The corporation offered to Jersey Company common stockholders in the alternative (a) $200 principal amount of its own 5% bonds for each share of Jersey common and secured by the common for which the bonds were exchanged or (b) a guaranty by the new company of 9% dividends a year per Jersey common share in consideration of the assignment by the Jersey stockholders of all dividends in excess of 9%; so that each Jersey common stockholder would, if the plan worked out (and the taxpayer risked its entire resources on that eventuality) receive the capital invested plus a return of either 9% or 10%. (3 R 906-908.)

The Jersey Company's charter expired by law on July 10, 1940; and one of the features of the plan was that the Jersey Company, whose bonds and preferred stock were non-callable, should be liquidated when its life came to an end, its obligations discharged, and its preferred stock paid off. Another feature was that the common stock of the Jersey Company, which would become the owner of the Chicago end of the enterprise upon the payment of these senior securities, should be acquired as fast as possible for bonds of the taxpayer or for cash. Sufficient bonds of the taxpayer—$13,000,000—were authorized so that all of the Jersey common—$6,500,000—could be acquired for bonds. This plan required, and Prince and Armour decided, that the money which would eventually be needed to execute it, should be taken out of the earnings of the enterprise; and for this purpose the treasury of the taxpayer was to be the treasury of the enterprise as a whole (3 R 908, 927; 1 R 355-358).

All of the Jersey common shareholders in due course (except three whose shares were acquired by the taxpayer in 1919 for cash) accepted one or other of the alternatives. (3 R 908.) By December 31, 1912, the taxpayer had actually invested $6,174,200 in the execution of the plan. (Ex S59 and S61.) The plan was thus adopted and the taxpayer committed to its execution before there were any income tax laws to evade or even any constitutional amendment making such a law possible.

(d) The execution of the plan.

The plan was carried out continuously in accordance with its original conception. The taxpayer acquired common stock of the Jersey Company as fast as it could and accumulated earnings to provide for the liquidation of that company.

In 1914, the Jersey Company became just a shell which had to be kept alive on account of its outstanding securities and guarantees which then, outside of its common stock, amounted to over $25,411.00 (Ex S-46). In that year the "By-Pass" agreement was entered into between the taxpayer and the Jersey Company whereby the net income of the Jersey Company (after 6% preferred and 9% common guaranteed dividends) by-passed that company and went direct to the taxpayer. By that agreement the Jersey Company foreclosed itself from ever accumulating any funds (except with the consent of the taxpayer) with which to meet the principal payments which would come due upon securities which it had issued or guaranteed. The taxpayer in accordance with the plan, undertook to provide for such payments by accumulating a portion of the funds it received under that agreement.

By this time the taxpayer had stepped into the Jersey Company's shoes as the head of the Enterprise. During the period in issue in this case, and for many years prior, Mr. Prince was the sole or dominant stockholder of the taxpayer, its president with a salary of $50,000 a year, and a paid officer, with a smaller salary of the Jersey Company, and two of the Chicago units of the Enterprise. During the period in issue the testimony on this point (which was offered by the taxpayer and was not contradicted) was that the taxpayer through Mr. Prince, its president, and to a lesser extent through Mr. McDonough, its vice-president, supervised, directed and managed the affairs of the subsidiaries other than routine business. (1 R 142-151; 187-8; 190-3; 225-7; 243-7; 287-291; 294.)

From time to time the taxpayer was required by business necessity of the Enterprise to use funds for various purposes. In 1922, it loaned Mr. Prince $2,300,000 to enable him to buy out the Armour interest in the taxpayer when a United States Court decreed that packer and stockyards' interests must be divorced and the taxpayer could not directly buy from Armour. (3 R 909.) In 1932 and 1933, it became necessary to save banks in Chicago from failure. This required the expenditure of over $12,833,633.61 (3 R 912, 914) which was made by the taxpayer and other units of the enterprise under its direction (3 R 912, 914-5). In 1932, it became necessary for the taxpayer to lend $1,000,000 to Mr. Prince to enable him to secure sufficient control of Armour & Co. so that its business might be retained for the stockyards (3 R 926).

In short, the taxpayer thus became and remained the dominant company of the corporate structure. Substantially all of the profits of the subsidiary companies not used

to pay interest and dividends on their publicly-held securities ultimately found their way into the treasury of the taxpayer; and it was the taxpayer that directed all corporate policies, met any deficits in the subsidiary treasuries, and provided the funds when any unusual expenditures were required. At the beginning of its existence and before the Sixteenth Amendment was adopted, the taxpayer established a long-range policy of accumulating funds against the day in 1940 when the charter of the Jersey Company should expire and sums aggregating over $30,000,000 would be needed for its liquidation. Beginning in 1924 and throughout 1933, the taxpayer paid dividends of $400,000 per annum (which was 40% on the original investment), the balance of its earnings being accumulated in its treasury for the purpose above set forth.* (3 R 918.)

Those are the objective facts found by the Board and accepted in full by the Court below. This statement is qualified only to the extent that the Board in its opinion (3 R 938) attributed to Prince as an individual the exercise of the powers[1] of management which we, and the witnesses who testified, ascribe to the taxpayer. Upon them the Board concluded that the taxpayer was a mere holding or investment company and the Court below held that the conclusion was erroneous as a matter of law.

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*No question as to the propriety of this plan was pressed under Section 104 of the Revenue Act of 1928 (or under the like sections in the Act of 1913 and subsequent revenue acts) until sometime in 1936 when, for the first time, the Commissioner asserted that the continuing accumulations of surplus under the plan adopted in 1911 had subjected the taxpayer to the penalty tax provided by Section 104 (a) of the statutes enacted in 1928 and 1932.

[1] The petitioner, in its statement (Petitioner's brief, p. 20), treated the Board's statement in its opinion as the facts rather than the facts found by the Board in its Findings of Fact Nos. 35 and 36 (3 R 929-30).

At this point we suggest the utter unsoundness of petitioner's contention and the Board's holding that the actual management and financing of the several subsidiaries in the Stock Yards enterprise is, as matter of law, to be attributed to Prince as an individual—thus bolstering the proposition that the taxpayer invested but did not manage. But under the plan of liquidation and the By-Pass Agreement of October 1, 1914, it became and was the bounden duty of the taxpayer to finance the subsidiaries whose earnings it absorbed. The situation was not different in substance from what it would have been if the entire enterprise had been owned by one corporation, which had several branches or departments, with each department having its own set of creditors and obligations which the enterprise as a whole must take care of. Since such financing actually took place, the petitioner is in substance contending that the things thus done are to be attributed not to the taxpayer under duty to do them but to a third person acting for the honor of the taxpayer. If this contention were to prevail, the taxpayer would be encouraged to contend that it was Prince as an individual who made the accumulation here complained of and that the attempt to penalize the incorporated taxpayer for permitting itself to be availed of for an unlawful purpose must therefore fail. In either case such a contention should be stigmatized as a fairly desperate effort to blink the realities of the situation. The taxpayer in fact did the financing and if there was any illegal accumulation must take the consequences. The management and financing of the subsidiaries was the necessary and proper result of their control by the taxpayer. Prince owned none of the stock of the subsidiaries and served in official capacities at stated salaries merely as the result of the control lodged

with the taxpayer. The taxpayer ventures to suggest that the argument of the petitioner on the merits gains nothing from the invocation of such highly artificial reasoning.

We have already cited authorities to the effect that, upon the facts found by the Board, the question whether the taxpayer was a "mere holding or investment company" within the meaning of the Act is open for determination by this Court (supra pp. 21-22).

(c) The Applicable Treasury Regulation.

The conclusion of the Court below is supported not only by the decisions but even by the provisions of Article 542 of Treasury Regulations 74 (promulgated under the Revenue Act of 1928) which reads in part as follows:

> "* * * When one corporation owns the stock of another corporation in the same or a related line of business and in effect operates the other corporation, the business of the latter may be considered in substance the business of the first corporation. Gains and profits of the first corporation put into the second through the purchase of stock or otherwise may therefore, if a subsidiary relationship is established, constitute employment of the income in its own business. To establish that the business of one corporation can be regarded as including the business of another it is ordinarily essential that the first corporation own substantially all of the stock of the second. Investment by a corporation of its income in stock and securities of another corporation is not without anything further to be regarded as employment of the income in its business."

The provisions of Regulation 77 promulgated under the Revenue Act of 1932 are substantially identical. In fact, substantially the same regulation was in existence at the

time of the passage of the Revenue Acts of 1926, 1924, 1921 and 1918.* The repeated reenactment of the provisions of Section 104 of the Revenue Act as they appear in the Revenue Acts of 1918, 1921, 1924, 1926, 1928 and 1932 "is upon accepted principles a Congressional adoption of the regulation as correctly interpreting these sections." *White v. U. S.*, 305 U. S. 281, 291. A clearer case for the application of that principle can scarcely be imagined.

The words of the regulation are tailor-made for the facts as found by the Board in this case. The petitioner's argument is directly contrary to his own regulation which now has the force of law. No reason has been suggested why the regulation should not be given full force and effect in this case as doubtless it has in many others which have come before the Commissioner.

In view of the foregoing the following conclusion of the Court below based in its entirety on facts found by the Board cannot be successfully challenged as a matter of law (4 R 1286-7):—

> "In the present case, petitioner [present respondent] was formed to be the directing head of the whole integrated enterprise, supplanting, in that respect, the Jersey Company, which became a 'mere shell.' Its purpose was to keep the enterprise intact, not to milk it dry and allow it to disintegrate in 1940. The commitments [petitioner] made in 1911 by guaranteeing dividends of 9 per cent on the common stock of the Jersey Company, and the guarantee it made in the 'bypass agreement' of 1914, made it necessary for [peti-

*Revenue Act of 1926—Regulations 69, Article 352
Revenue Act of 1924—Regulations 65, Article 352
Revenue Act of 1921—Regulations 62, Article 352
Revenue Act of 1918—Regulations 45, Article 352
Revised 4-17-1919.

tioner], in protection of its investment, to exercise an active supervision over the underlying operating companies, whose continued success was so vital to its own financial health. Since, under the by-pass agreement, it drew up into its own treasury the earnings of the subsidiary companies without allowing the individual companies to make the accumulations which they normally would have needed for their own corporate purposes, [petitioner], as banker for the enterprise, necessarily had to have a very substantial accumulation of funds at its disposal.

"Considering [petitioner's] activities and commitments, it seems to us to be a good deal more than a 'mere holding company' having 'no need for the accumulation of gains and profits.' Certainly, from the businessman's point of view, [petitioner's] business is the business of the stockyards enterprise as a whole. The enterprise is a close-knit organism composed of many corporate members, of which [petitioner] is the corporate head, supplying the direction and coordination. This appears clearly enough from the facts already stated, and in the Board's findings, not previously quoted: • • •"

The taxpayer was, therefore, fully justified as a matter of good business in accumulating a surplus; and the propriety of its action was recognized both by the Commissioner in his regulations and by the Congress in giving the regulation the force of the statute.

(f) The responsibility resulting from absorbing revenue of subsidiaries.

Furthermore, for taxpayer to have distributed all its earnings would have been *illegal*. It must be remembered, as the Court below points out, that taxpayer "proceeded to build up in its treasury a strong position in cash and liquid

assets with a view to achieving the goal set for 1940. In general, petitioner [respondent here] did not permit the various subsidiary companies to make accumulations which would normally have been appropriate for their individual needs but sucked up into its own treasury most of the available funds in the various companies of the enterprise, and advanced funds to the subsidiaries as the need arose." There can be no doubt about it. The Board found in a supplementary finding of fact (3R. 1202):

> "47. During the years 1922-1933, inclusive, the petitioner [respondent here] withdrew from the Jersey Company and its subsidiaries in dividends more than the net earnings of the Jersey Company and its subsidiaries for that period available for distribution to the petitioner [respondent here]."

Under such circumstances this taxpayer could justly have been condemned both economically and legally (as many holding companies have been) if it had absorbed the earnings of subsidiaries and distributed them without regard for the welfare of the operating units. It not only did not do so; it had contracted with the Jersey Company that it would not permit any exhaustion of the Jersey treasury to defeat the obligations of the Jersey Company. The provision in question is as follows (Ex S-46 pages 52-53 infra):

> "All income of the New Jersey Company hereafter received or collected by it from any source whatever, shall be by it applied first to the payment of its own expenses; second, to the payment of all taxes payable or chargeable to the New Jersey Company; and the surplus then, if any, remaining, shall be paid to the Maine Company upon its request, *but subject, however, to any agreements or obligations on the part of the New Jersey Company now existing.*" (Italics supplied.)

From October 1, 1914, to December 31, 1933, the taxpayer received over thirty million dollars under this agreement. To the extent of at least twenty-five million dollars the taxpayer was under the heaviest sort of obligation so to deal with these funds as to assure financial protection to the creditors and stockholders of the Jersey Company. That corporation on October 1, 1914, had funded obligations outstanding amounting to $18,911,000, and there was $6,500,000 of preferred stock also in the hands of the public (Ex S-46). Moreover (as above indicated) the Jersey Company was itself a holding company owing duties of good faith to its subsidiaries in additon to the discharge of its purely legal commitments.

It is not merely an economic but a legal duty of a holding company under such an arrangement as the taxpayer had made with the Jersey Company so to deal with its receipts as to give the creditors and stockholders of the Jersey Company ample protection to the full amount of their claims. The books are full of cases of holding companies which have been determined to be liable for failure to provide such protection. See *Taylor v. Standard Gas & Electric Company*, 306 U. S. 307, 323-324; *Vallery v. Denver & Rio Grande Railroad Company*, 236 Fed. 176. If the taxpayer had adopted the policy which the Board made mandatory, it would have distributed all of its earnings to Mr. Prince. Had it done so both the corporation and he would have been compelled to answer both to the preferred stockholders of the Jersey Company, as in the *Taylor* case, and to the creditors of the Jersey Company, as in the *Vallery* case. It was therefore legally incumbent upon the taxpayer to act as it always had acted and to accumulate sufficient money to provide for the protection which it always planned to provide.

What has just been said would be true at any time. It was particularly true in 1930-1933 in the depths of the worst depression this country has ever seen.

(2) The Court Below Did Not "Substitute Its Judgment for That of the Board."

The petitioner contends that the Board, without the aid of statutory presumption, made findings of fact from which it inferred the existence of the interdicted purpose and that the Court below overturned this factual inference and substituted its own judgment for that of the Board.

This is a pivotal contention; for if it were sound the taxpayer would have to concede that the Court below erred. But it is demonstrably unsound—and this for three reasons.

In the first place, this is *not* a case in which the Circuit Court of Appeals (as in the *National Grocery* case) decided a question of fact differently from the Board. The Court merely remanded the instant case to the Board for its reconsideration and was scupulously careful to avoid the very error which the petitioner mistakenly imputes to it. That this is a correct statement clearly appears from the opinion of Judge Magruder, and particularly from the following passage (4 R 1297):

> "* * * the Board will have before it the ultimate question whether petitioner has sustained the burden of proving that the Commissioner's determination was wrong, that is, whether the Board is satisfied on a preponderance of the evidence that in Prince's decision on behalf of petitioner to distribute no more than $400,000 in dividends in each of the taxable years, the forbidden motive of surtax avoidance played no substantial part."

In the second place, the action taken by the Court on this phase of the case was merely a familiar exercise of a court's discretion to order a new trial when the court believes that the jury's approach to the vital issue has been disturbed by extraneous considerations. When under such circumstances a verdict is set aside and a new venire ordered, nobody supposes that the court is substituting its judgment for that of the jury. Everybody understands that the jury will have the last "say" on the question of fact and that reconsideration is ordered merely to insure a fair trial. In the instant case the Circuit Court of Appeals rightly concluded that the question whether the taxpayer was a mere holding company had so engrossed the attention of the Board as to give the taxpayer less than a fair chance to have the really vital issue in the case independently considered and decided by the Board itself. We submit that a reading of the opinion of the Board should satisfy this Court that the Court below exercised a sound discretion in an effort to avert a possible injustice.

Finally (and in confirmation of the point last urged) the Court's attention is called to the fact that the Board made no specific finding of the facts from which it drew the vital inference of illicit purpose: it merely resorted, in the course of its opinion, to the familiar device of buttressing a decision already reached on other grounds by observing that the case would be decided in the same way if the main basis of the decision were erroneous.

That this is a correct interpretation of the Board's action will appear if first the applicable paragraph of the Board's opinion is read and, second, if the facts therein summarized are considered one by one. The paragraph in question is as follows (3 R 945):

"Even without the benefit of the statutory presumptions, we think there is sufficient evidence in the record to show the existence of the condemned purpose. The bare recital of the undisputed facts relating to the organization of the petitioner, the balance sheets, the source of earnings, the nature of the investments, the large accumulations of cash and surplus, the loans of cash and securities to the petitioner's sole stockholder, and the continued reinvestment of its gains and profits in securities, present, in our opinion, a situation typical of situations which Congress intended to cover by section 104 of the Revenue Acts of 1928 and 1932."

What the Board itself thus describes as a "bare recital" covers seven matters of fact which, whether considered singly or all together, cannot possibly supply a legitimate premise for the asserted conclusion.

The first fact said to support the inference of an intent to evade income tax liability is "the undisputed facts relating to the organization of the respondent." The undisputed facts are that the respondent taxpayer was organized in 1911, two years before the Sixteenth Amendment was adopted, that it was formed to take the position in the Stock Yards enterprise theretofore occupied by the Jersey Company, that its immediate purpose was to establish a community of interest between the stock-yards industry and the packers, and that its organizers (Prince and Armour) planned from the outset to accumulate earnings for the ultimate liquidation of the Jersey Company without dismembering the integrated enterprise. From these indisputable facts an inference of honest purpose may fairly be drawn—but nothing else. Indeed the petitioner never contended to the contrary; and the Board has itself expressly held that the interdicted purpose cannot be in-

ferred from the organization of taxpayer for the Board says in its opinion (3 R 934):

> "The petitioner was formed in 1911. It clearly was not formed for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains or profits to accumulate instead of being divided or distributed, and the respondent does not so contend."

The second basis of inference is "the balance sheets." But the balance sheets show only the fact of accumulation: they throw no light whatever on the reasonableness of it. It is precisely because the mere existence of an accumulation may have led the Board to its ultimate conclusion, that the Court below remanded the case for further consideration by it as the ultimate trier of fact.

The third basis is "the source of earnings." The implication is that the taxpayer merely holds the shares of other corporations and receives such dividends as they are pleased to declare. In other words, the Board is here again conceiving of the taxpayer as a mere holding or investment company—while professing not to do so. The fact is that the taxpayer's "sources of income" have always been the earnings of the Stock Yards enterprise as a whole, which the taxpayer has gathered into its treasury through dividends declared at taxpayer's direction. The earnings, when thus assembled, have been accumulated to retire bonds and stock held by the public and, in the interval, to service the financial needs of the several subsidiaries. These "sources of income", when the facts are known, cannot possibly be a basis for inferring a purpose to evade taxes. The income of taxpayer from sources other than the Stock Yards enterprise was only slightly in excess of one per cent.

The fourth basis is "the nature of the investments." Quite obviously the nature of the investments is irrelevant to the issue. The bare *existence* of investments (into which earnings have been put) would be significant—but only if taxpayer were a mere holding company. It is, however, a significant fact that over 94% of respondent's investments were in the securities of members of the integrated enterprise (3 R 919). The contrast with such a case as the *National Grocery* case could not be more striking.

The fifth basis is "the large accumulations of cash and surplus." Here again we get a glimpse into the mind of the Board: what really motivated the decision was the mere existence of large accumulations, without regard to their justification or propriety. Clearly the mere existence of accumulations is without significance unless the corporation is a mere holding or investment company. Nothing could be more persuasive of the rightness of Judge Magruder's analysis of the Board's decision when he says that the Board's ultimate finding of the forbidden purpose was predicated chiefly upon its finding that taxpayer was a mere holding or investment company which had accumulated profits beyond its reasonable needs (4 R 1296). This alone is a most compelling reason for the new trial which has been granted by Court below.

The sixth basis is "the loans of cash and securities to the petitioner's [respondent's] sole stockholder." The bare fact that such loans were made can support no inference whatsoever. The actual fact that practically all of them were made to accomplish the purpose for which the taxpayer was formed is wholly consistent with an honest purpose and supports no inference to the contrary. Upon this point we submit that the following from the opinion of Judge Magruder is the only sound analysis (4 R 1295-6):

"• • • during the period 1930-1933 Prince's net debt to petitioner increased by $886,070, which increase was more than accounted for by the loan of $1,000,000 to Prince in 1933 to enable him to purchase a large block of stock in Armour & Company. This purchase, as indicated by the Board's finding which we have previously quoted, redounded to the benefit of petitioner. The significance of the loans to Prince is tied up with the question whether petitioner has accumulated profits beyond the reasonable needs of the business. If, on a proper view, such accumulations were deemed to be not unreasonable, this would suggest a possible reason why loans were made to Prince instead of increased dividends. The loans bore interest and were amply secured by a deposit of collateral, and hence did not impair petitioner's plan of accumulation. Of course, if there were no need of any further accumulation in 1933, the loan of $1,000,000 to Prince in that year to enable him to buy his way into Armour & Company, instead of paying a dividend to him in that amount, would take on added significance."

The seventh (and final) basis of inference is "the continued reinvestment of its gains and profits in securities." This is a mere reassertion of the proposition (which at this point the Board is professing to ignore) that the taxpayer is a company bound not to accumulate or to invest its earnings but merely to distribute them. We respectfully submit that this constant reiteration by the Board of this single proposition demonstrates the need of a new trial if, as we contend, the Court below was right in deciding that the taxpayer is *not* a mere holding or investment company within the meaning of the Act of Congress; and is the head of one integrated enterprise.

It thus appears that the so-called "finding" on which the Commissioner so strongly relies is nothing but a

begging of the question adroitly made to appear like a process of reasoning. In no instance, in the so-called finding or elsewhere in the record, did the Board make a finding of a single evidential fact that the condemned purpose actually existed during any of the years in issue.[1] On the contrary, when faced squarely with the question as to whether the condemned purpose actually existed, the member of the Board who wrote the majority opinion, answered in the negative. His language, with italics supplied by us, follows:

> "I might state at this point that I never had any doubt from the testimony in this case, that Mr. Prince and the others in authority here *had an expectation* all during the years 1920 to 1933 inclusive, *to liquidate the Jersey Company.* I think that the testimony warrants that, but was not the basis of any conclusion that I reached. If any member of the Board reached a contrary conclusion from any statement made in the opinion, why it should be corrected, of course." (3 R 1072.) (Italics supplied.)

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[1] In a footnote to page 18 of petitioner's brief there is a reference to transactions in 1931-1933 and in 1918 between Prince and respondent. The reference to the 1918 transaction is misleading unless supplemented by the explanation appearing in Volume 3 of the Record at pages 1019-1021, from which it appears that Prince's personal taxes were substantially increased by the transaction—a fact which caused one of the members of the Board to refer to this transaction as a "dead cat" (3 R 1082). As to the later transactions, as pointed out by member Sternhagen in his dissenting opinion, aside from the fact that the amounts were comparatively too small to be indicative of purpose under Section 104, such transactions in themselves have no significance in determining whether the corporation was availed of to prevent a surtax on the shareholders through the means of allowing its gains or profits to accumulate instead of being divided or distributed.

And again he said (3 R 1073):

> "I could not find from the record any evidence that the Maine Corporation had any purpose except the purpose of Prince, and the company could not have, the corporation can't have a purpose except the purpose of its officers or directors, and *I have no doubt that Prince had the idea, I think it was plain all through this testimony, that it was his idea to accumulate money in the Maine Company for the purpose of purchasing common and preferred shares to pay off not only all of the bonds of the Jersey Company in or before 1940 but all of the indebtedness of all of the other corporations.*" (Italics supplied.)

And again he said (3 R 1078):

> "Was that the purpose of bringing in this so-called newly discovered evidence, to prove what I stated that I am sure the evidence does support, that is, *I think evidence in the record supports the proposition that Prince and his associates,* if he had any, Armour, or away back before Armour got out of the Maine Company but they *had it in their minds to use this company to accumulate funds whereby they could acquire the stock of Jersey Company, and also acquire enough money to pay off all of the indebtedness of not only the Maine Company but the Jersey Company and all of the other companies on up to 1940?*"
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> "What I call the liquidation of the Jersey Company, it is more than that, it is the acquisition of the shares of stock of another corporation, and now it seems to me that any holding company can do that but it does not seem to me that that is within the reasonable needs of the business within the meaning of the statute, and I so stated in the opinion." (Italics supplied.)

Conclusion.

The Circuit Court of Appeals asserted no right to draw a factual inference different from that of the Board. The Circuit Court of Appeals without expressing its own view on the ultimate question of fact merely remanded the case to the Board for its decision, instructing the Board that it was mistaken as a matter of law in interpreting the words "mere holding or investment company" as used in the Act as applicable to a company like the taxpayer, and instructing it to decide the factual issues in the light of this instruction.

We urge upon this Court a consideration of the injustice which would result, if the taxpayer were never to have a chance to present its case to the Board without being met at every turn by a persistently mistaken notion of its true nature and function.

Respectfully submitted,

George Wharton Pepper,
Attorney for Respondent.

J. N. Welch,
Francis B. Keeney,
L. E. Green,
Frederick H. Spotts,
Erwin N. Griswold,
Of Counsel.

Appendix.

EXHIBIT S-46.

THE CHICAGO JUNCTION RAILWAYS

AND

UNION STOCK YARDS COMPANY

AND THE

CHICAGO STOCK YARDS COMPANY

AGREEMENT

Relating to Application of Income
Dated 1st October 1914

An Agreement made this first day of October 1914 between THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY incorporated under the laws of New Jersey (hereinafter called the *New Jersey Company*) of the one part the CHICAGO STOCK YARDS COMPANY incorporated under the laws of Maine (hereinafter called the *Maine Company*) of the other part

WHEREAS the *Union Stock Yards & Transsit Company* (hereinafter called the *Transit Company*) is a corporation duly organized under the laws of Illinois and has issued and outstanding 132,000 common shares of the par value of $100 each and $500,000 4½ per cent gold debentures dated 1st January 1910 payable 1st January 1920 issued under an indenture between the *Transit Company* and the

First Trust & Savings Bank dated 1st January 1910

Common Shares	$13,200,000
Debentures	500,000
Total Capitalization of the *Transit Company*	$13,700,000

AND WHEREAS the *Chicago Junction Railway Company* (hereinafter called the *Railway Company*) is a corporation duly organized under the laws of Illinois and has now issued and outstanding 55,000 common shares of the par value of $100 each

Common Shares	$5,500,000
Total Capitalization of the *Railway Company*	$5,500,000

AND WHEREAS the railways of the *Transit Company* are leased to the *Railway Company* by instrument dated 1st December 1913 under which the *Railway Company* is bound to pay as annual rent the sum of $600,000 to the *Transit Company* or upon its order

AND WHEREAS the *New Jersey Company* now has issued and outstanding

(*a*) 130,000 shares of capital stock of the par value of $100 each of which 65,000 are 6 per cent cumulative preferred shares and 65,000 are common shares

Preferred Shares	$6,500,000
Common Shares	6,500,000

(*b*) $10,000,000 Five Per Cent Collateral Trust Gold Bonds dated 1st July

1890 payable 1st July 1915 issued under a deed of trust from the *New Jersey Company* to the *Central Trust Company of New York* dated 10th July 1890 whereby 120,000 shares of the *Transit Company* are pledged as security for the said bonds

5% Bonds	$10,000,000

(*c*) $4,000,000 Four Per Cent Forty Year Mortgage and Collateral Trust Refunding Gold Bonds dated 1st April 1900 payable 1st April 1940 issued under a mortgage and deed of trust from the *New Jersey Company* to *The Standard Trust Company of New York* dated 10th April 1900 whereby there are pledged as security for the said bonds 11,083 shares of the *Transit Company* 54,991 shares of the *Railway Company* and $2,500,000 Fifty Year General Mortgage Gold Bonds of 1907 of the *Indiana Harbor Belt Railroad Company* dated 1st July 1907 payable 1st July 1957 issued under a mortgage from the *Indiana Harbor Belt Railroad Company* to the *Guaranty Trust Company of New York* dated 1st November 1907 and the said 120,000 shares of the *Transit Company* (subject to the lien of the said Five Per Cent Collateral Trust Gold Bonds)

4% Bonds	4,000,000
Total Capitalization of the *New Jersey Company*	$27,000,000

AND WHEREAS the *New Jersey Company* has guaranteed the payment of the principal interest and sinking fund of a total authorized issue of $3,000,000 First Mortgage Five Per Cent Twenty Year Real Estate Improvement Bonds dated 1st March 1908 payable 1st March 1928 issued under a mortgage and deed of trust from *John A. Spoor Frederick S. Winston* and the *New Jersey Company* to the *Standard Trust Company of New York* dated 1st March 1908 of which there are now outstanding $2,584,000 bonds

Real Estate Bonds	$3,000,000

AND WHEREAS the *New Jersey Company* has guaranteed the payment of the principal and interest upon $2,327,000 first mortgage Four Per Cent Forty Year Gold Bonds of *The Chicago Junction Railroad Company* dated 1st March 1905 payable 1st March 1945 issued under a first mortgage from *The Chicago Junction Railroad Company* to the *First Trust and Savings Bank of Chicago* dated 1st March 1905

Railroad Bonds	$2,327,000

AND WHEREAS the *New Jersey Company* owns or controls all of the shares in the capital stock of the *Transit Company* and of the *Railway Company* now issued and outstanding

AND WHEREAS the *Maine Company* now owns 31,075 common shares of the *New Jersey Company* and certifi-

cates representing 33,922 common shares of the *New Jersey Company* have been deposited with the *Old Colony Trust Company* under an agreement between said *Old Colony Trust Company* and the *Maine Company* dated 27th September 1911 and the *Maine Company* has in accordance with the said agreement endorsed the said certificates as follows:

"The *Chicago Stock Yards Company* does hereby guarantee to the holder of the shares evidenced by this certificate and the assigns of such holder and to the transferee hereof, to pay to the registered holder of said shares at the time of such payment, on the first days of January, April, July and October in each and every year, beginning on the 1st day of January 1912 a fixed sum amounting to two and one-fourth per cent. upon the par value of said shares, in consideration of which guaranty and the due and punctual performance thereof from time to time, the holder of said shares and each and every assign thereof does hereby sell, assign, set over and direct to be paid to the *Old Colony Trust Company*, as Trustee under the agreement hereinafter mentioned, or upon its written order, any and all dividends and other payments out of earnings apportionable to the shares represented by this certificate or directed to be paid to the holder hereof, which may at any time be made by or on behalf of *The Chicago Junction Railways and Union Stock Yards Company*, or its successor, to be by said Trustee disposed of as in said agreement specified and provided.

This indorsement is placed hereon pursuant to and subject to the terms and conditions of a certain Trust Agreement dated 27th September 1911, signed

by the *Chicago Stock Yards Company* and deposited with the *Old Colony Trust Company*, as Trustee, to which the holder hereof has assented and become a party.

Each and every assign or transferee of this certificate, by accepting delivery hereof, does accept and confirm the above-mentioned assent of the holder and the terms and conditions of said Trust Agreement and become a party thereto and does direct the placing of this indorsement on any new certificate which may be issued in lieu hereof.

CHICAGO STOCK YARDS COMPANY

By

Assistant Secretary."

so that the *Maine Company* is now entitled to all of the income of the *New Jersey Company* applicable to dividends on the common shares of the *New Jersey Company*

And Whereas the parties hereto desire to simplify their financial relations and operations for their mutual benefit and the protection of the various creditors holders of securities and shareholders respectively

Now therefore in consideration of the premises and of the mutual promises herein contained it is agreed by and between the parties hereto as follows

1. The *Maine Company* hereby guarantees to the *New Jersey Company* the prompt payment of the following

(*a*) All expenses interest and taxes payable by or chargeable to the *New Jersey Company* including certain principal and interest payments under the two contracts between *Richard Fitzgerald* the *Merchants'*

Loan & Trust Company and *Anna L. Sexton* both dated 1st June 1914 and the interest on certain demand notes of the *New Jersey Company* aggregating $259,520 secured by 548 shares of the *Transit Company*

(*b*) The interest upon the said Five Per Cent Collateral Trust Gold Bonds and the said Four Per Cent Forty Year Mortgage and Collateral Trust and Refunding Gold Bonds when and as the same becomes due and payable and the *Maine Company* further agrees to make the payments and to fulfil all of the obligations of the *New Jersey Company* under the mortgages and deeds of trust securing the said bonds except the payment of the principal of the said bonds

(*c*) All payments which the *New Jersey Company* may be required to make under and in accordance with Article 6 section 3 of the said mortgage and deed of trust from *John A. Spoor Frederick S. Winston* and the *New Jersey Company* to the *Standard Trust Company of New York* dated 1st March 1908 and all other payments other than the principal of the said First Mortgage Five Per Cent Twenty Year Real Estate Improvement Bonds which the *New Jersey Company* may be required to make under and in accordance with the covenants contained in the said mortgage to be performed by the *New Jersey Company*

(*d*) All payments which the *New Jersey Company* may be required to make by virtue of its guaranty of the interest but not of the principal of the said $2,327,000 First Mortgage Four Per Cent Forty Year Gold Bonds of *The Chicago Junction Railroad Company*

(*e*) Dividends at the rate of 6 per cent per annum upon the preferred shares of the *New Jersey Company* now issued and outstanding

(*f*) Fixed sums on the first days of January April July and October in each year amounting to 2¼ per cent upon the par value of all common shares of the *New Jersey Company* now or hereafter deposited with the *Old Colony Trust Company* as trustee under the said agreement dated the 27th September 1911

2. The *New Jersey Company* assigns and transfers to the *Maine Company* all its right title and interest in and to any dividends that may hereafter be declared by the *Transit Company* and the *Railway Company* respectively and all its right title and interest in and to all income and surplus earnings of the said companies or either of them that may now or hereafter be divisible or distributable among the shareholders of the said companies or either of them in the form of dividends or otherwise subject however to all obligations and agreements respecting such dividends and income as may now exist

3. The *New Jersey Company* as the owner of all of the shares in the capital stock of the *Railway Company* and in fulfillment of its obligations under the preceding paragraph hereof and for the purpose of insuring the performance by the *Maine Company* of its agreements hereunder hereby agrees to direct the *Railway Company* from time to time out of the funds in its treasury otherwise applicable to the payment of dividends on the shares of its stock owned by the *New Jersey Company* to pay the following

(*a*) On or before the 1st days of June and December in each year the *Railway Company* shall be

directed to pay to the *Central Trust Company* of New York the sum of $250,000 to be applied to the payment of interest on the said Five Per Cent Collateral Trust Gold Bonds of the *New Jersey Company* PROVIDED that after the said bonds shall have been paid or retired the said sums shall be paid in accordance with the order of the *Maine Company*

(*b*) On or before the 15th days of March and September in each year the *Railway Company* shall be directed to pay to the *Guaranty Trust Company of New York* the sum of $80,000 to be applied to the payment of interest on the said Four Per Cent Forty Year Mortgage and Collateral Trust Refunding Gold Bonds of the *New Jersey Company* PROVIDED that after the said bonds shall have been paid or retired the said sums shall be paid in accordance with the order of the *Maine Company*

(*c*) Whenever it shall from time to time appear that the *Railway Company* will have in its treasury funds sufficient to make the payments above specified as the same become due it may pay any surplus of the said funds to the *Maine Company* upon its request

4. The *New Jersey Company* as owner of all of the shares in the capital stock of the *Transit Company* and in further fulfillment of its obligations under paragraph 2 hereof and for the purpose of insuring the performance by the *Maine Company* of its obligations hereunder hereby directs the *Transit Company* from time to time out of the funds in its treasury otherwise applicable to the payment of dividends on the shares of its stock owned by the *New Jersey Company* to pay the following

(*a*) On or before the 25th days of March June September and December in each year the *Transit Company* shall be directed to pay to the *Old Colony Trust Company* the sum of $97,500 to be by it applied to the payment of the quarterly dividends on the preferred shares of the *New Jersey Company* now issued and outstanding

(*b*) On or before the 25th days of March June September and December in each year the *Transit Company* shall be directed to pay to the said *Old Colony Trust Company* the sum of $76,324.50 to be by it applied to the payment on the 1st days of January April July and October of the sums payable under the said agreement of the 27th September 1911 to holders of common shares of the *New Jersey Company* deposited thereunder or such other sums as may from time to time be sufficient and payable for that purpose

(*c*) Whenever it shall from time to time appear that the *Transit Company* will have in its treasury funds sufficient to make the payments above specified as the same become due it may pay any surplus of the said funds to the *Maine Company* upon its request

5. The *New Jersey Company* agrees that it will by irrevocable instrument order the *Transit Company* to authorize and direct the *Railway Company* to apply the annual rent of $600,000 payable under the said lease to the payments to be made by the *Railway Company* under the provisions of paragraph 3 hereof

6. All income of the *New Jersey Company* hereafter received or collected by it from any source whatever shall be by it applied *first* to the payment of its own expenses

second to the payment of all taxes payable or chargeable to the *New Jersey Company* and the surplus if any then remaining shall be paid to the *Maine Company* upon its request but subject however to any agreements or obligations on the part of the *New Jersey Company* now existing. Whenever practicable the *New Jersey Company* shall authorize the *Maine Company* to collect such other income direct from the source thereof and shall take all such proceedings and do all such acts as may be necessary or expedient to enable the *Maine Company* so to do

7. The *New Jersey Company* may from time to time with the written consent of the *Maine Company* issue additional bonds or debentures secured by mortgage or otherwise or may guarantee the payment of principal and interest of bonds and debentures of other companies associations organizations or individuals whether or not the same are secured by mortgage whenever such issue or guaranty appears to be for the best interest of the *New Jersey Company* And in the event that bonds or debentures are so issued or guaranteed the *Maine Company* guarantees to the *New Jersey Company* the prompt payment of all interest sinking fund payments expenses and taxes which the *New Jersey Company* may be required or obliged to make in respect of such bonds or guaranty

8. Both parties hereby agree to execute and deliver all agreements and instruments that may be necessary or proper to enable the provisions of this agreement to be carried out and fulfilled according to the true spirit hereof, it being understood however that nothing herein contained shall be construed to require any corporation or person to do anything contrary to its existing contracts or obligations

9. The president or treasurer of the *Maine Company* and of the *New Jersey Company* respectively may from time to time determine all questions which may arise relating to the accounts between the said companies and may make such payments from one company to the other as may be necessary or convenient in order to carry out the true intent and purpose of this agreement

10. This agreement may be amended modified or rescinded at any time by action of the boards of directors or executive committees of the parties

IN WITNESS WHEREOF the parties have caused their respective common seals to be hereto affixed and these presents to be signed in their respective names and on their behalf by their respective officers thereunto duly authorized the day and year first above written Executed in four parts

THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY

By

FREDERICK H. PRINCE
President

Attest

M. A. TAYLOR
Secretary

C. J. Rwys. &
U. S. Y. Co.
SEAL

CHICAGO STOCK YARDS COMPANY

By

NORMAN J. MacGAFFIN
President

Attest

EDWARD N. MANNING
Secretary

C. S. Y. Co.
SEAL

CHICAGO STOCK YARDS ENTERPRISE

December 31, 1933

Chicago Stock Yards Company
(Maine Co.)
Inc Maine Sept 25, 1911
Cap Stock $8,000,000 par value – 80,000 shares
Bonds Outstanding – $2,620,000

Produce Terminal Corporation
Inc Illinois 1915
Cap Stk $2,000,000. –
20,000 shares
Wholly owned by Maine Co.

The Chicago Junction Railways and Union Stock Yards Company
(New Jersey Co.)
Inc New Jersey 1890
Cap Stk Pfd $6,500,000 – 65,000 shares
2,362 shares owned by Maine Co.
Com $6,500,000 – 65,000 shares
60,33⅓ shares owned by Maine Co.
Maine Co. is entitled to all net income of this company in excess of 6% dividends on Pfd. and 9% dividends on Com. not owned by it
Bonds outstanding – $14,000,000
Bonds guaranteed – $2,327,000 of Railroad Co.
$2,250,000 of C.M.D.

Pau Corporation
Inc Ill. 1931
Cap Stk $5,000.
50 shares
Wholly owned by Maine Co.

The Union Stock Yards and Transit Company of Chicago
(Transit Co.)
Inc Illinois 1865
Cap Stk $13,200,000. –
132,000 shares
Wholly owned by New Jersey Co.

The Stock Yards Harness and Saddlery Company
(Harness and Saddlery Co.)
Inc Illinois 1903
Cap Stk $10,000. – 100 shares
Wholly owned by Transit Co.

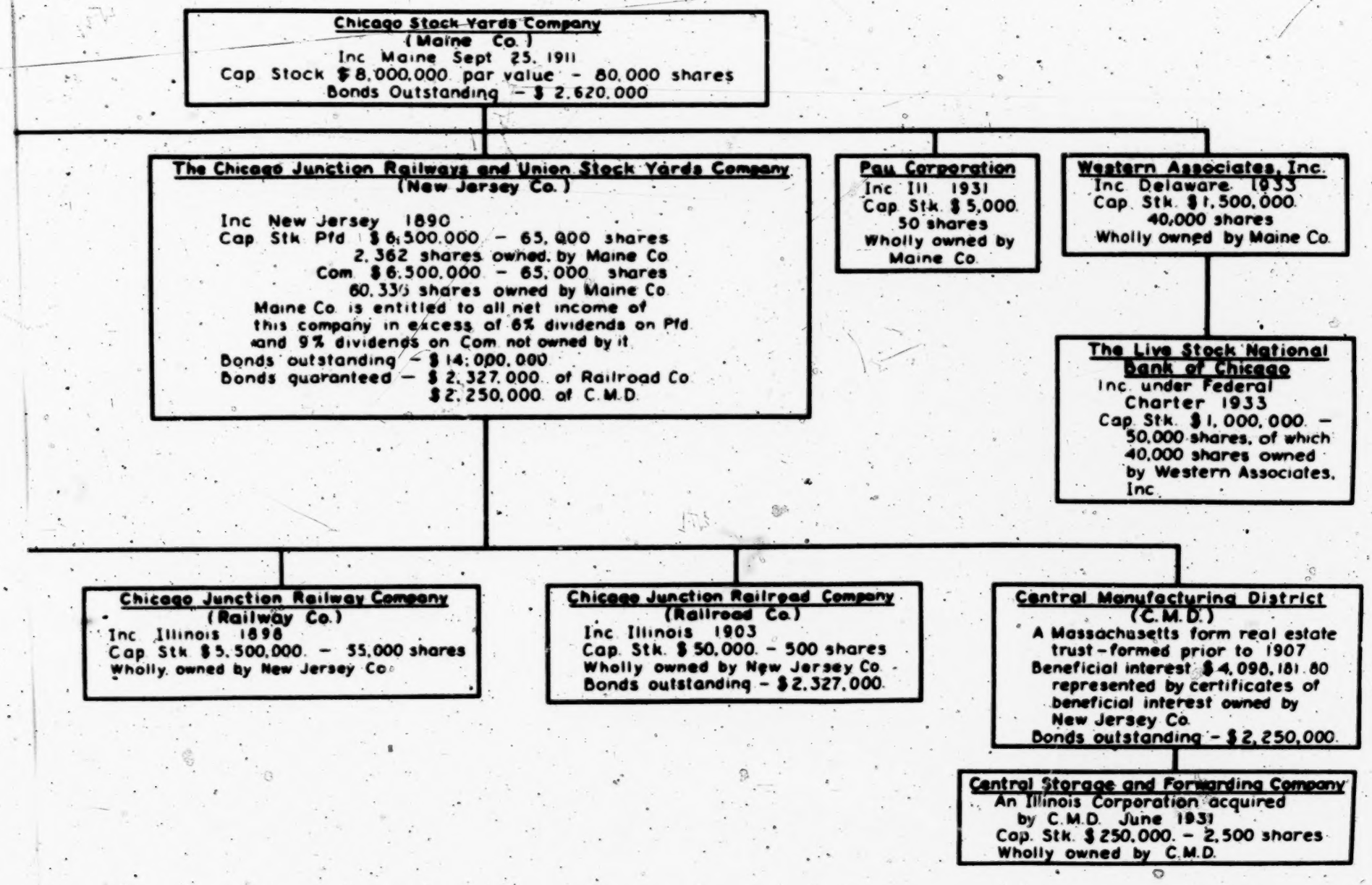
Chicago Junction Railway Company
(Railway Co.)
Inc Illinois 1898
Cap Stk $5,500,000. – 55,000 shares
Wholly owned by New Jersey Co.

Chicago Junction Railroad Company
(Railroad Co.)
Inc Illinois 1903
Cap Stk $50,000. – 500 shares
Wholly owned by New Jersey Co.
Bonds outstanding – $2,327,000.

CHICAGO STOCK YARDS ENTERPRISE

TAXPAYER'S EXHIBIT NO. 1.

December 31, 1933



SUPREME COURT OF THE UNITED STATES.

No. 488.—October Term, 1942.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Chicago Stock Yards Co. } On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

[April 12, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

The Board of Tax Appeals sustained the petitioner's determination of deficiencies in the respondent's income tax for 1930, 1932, and 1933.[1] The Circuit Court of Appeals reversed the Board's decision.[2] We granted certiorari because of the importance of the questions involved.

The challenged assessment was of the fifty per cent. additional tax imposed by § 104 of the Revenue Acts of 1928 and 1932.[3] The section, which is substantially the same in both statutes, provides, in subsection (a), that if any corporation is formed or availed of for the purpose of preventing the imposition of surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, the additional tax shall be imposed. That the corporation "is a mere holding or investment company," or that the gains or profits are "permitted to accumulate beyond the reasonable needs of the business," is declared, by subsection (b), prima facie evidence of a purpose to avoid the surtax.

The Union Stock Yards & Transit Company of Chicago, hereinafter called Transit Company, was incorporated in 1865 to operate stock yards in Chicago. Its business was profitable. Frederick H. Prince became a stockholder. In 1890 packers, who were the company's principal source of business, threatened to remove their plants from Chicago unless they were given a share in its profits. Due to limitations in its charter, the corporation could

1 41 B. T. A. 590.
2 129 F. 2d 937.
3 45 Stat. 814-15, 47 Stat. 195.

not raise funds necessary to buy off the packers. Mr. Prince and other stockholders met the situation by organizing a holding company under the law of New Jersey, The Chicago Junction Railways & Union Stock Yards Company, hereinafter called the New Jersey Company, which acquired all of the capital stock of the Transit Company. The capital structure at organization was 65,000 shares each of preferred and common, all of $100 par. Collateral trust bonds, secured by Transit Company stock, were issued, of which $14,000,000 were ultimately outstanding. The charter was to expire in 1940. The New Jersey Company came to own all of the stock of the Transit Company, of a railway company, a railroad company, and all beneficial interest in a real estate trust, which themselves, or through subsidiaries, pursued activities collateral to the stock yards' business. By payments in cash and its own bonds it procured from the packers an agreement to maintain the stock yards at their then location for fifteen years.

When this agreement was about to expire the packers presented fresh demands and Mr. Prince was compelled to devise some method of satisfying them. He decided that if he could obtain the cooperation of the largest he need not trouble about the others. To attain this end he organized, in 1911, the respondent, a Maine corporation. He formed a committee which made a proposal to the New Jersey Company's common stockholders that the respondent would purchase their stock by giving them $200 par of its 5% bonds for each share of common stock or, in the alternative, would stamp the stock with the company's agreement to guarantee a 9% dividend upon it; this in consideration that the respondent should be entitled to all of the New Jersey Company's earnings over and above its expenses, interest charges, and the guaranteed dividend on the common. Thus it was intended to draw into the taxpayer's treasury the excess of the New Jersey Company's earnings. Armour & Co. was given 20% of the respondent's stock, Prince retaining 80% of it. In this way Armour was to share in the earnings of the stock yards.

By a decree in a suit under the Sherman Act, Armour was ordered to part with all interest in the stock yards. In consequence Mr. Prince purchased the Armour-held stock for $1,000,000, which sum was loaned to him by the respondent. Thus Prince became the taxpayer's only stockholder and it is conceded that

he retained ownership or voting power which gave him sole control of the company to the close of 1933.[4]

By August 1914 the respondent had acquired, in exchange for its bonds, 31,075 common shares of the New Jersey Company and 33,922 shares had been stamped with its guarantee. In 1919 it acquired the three remaining shares. In the period from 1915 to 1933 it organized two small wholly-owned subsidiaries to transact business connected with the stock yards' enterprise, and also organized, and held four-fifths of the capital stock of, a national bank intended to serve the stock yard district.

The respondent in addition to the New Jersey Company common stock acquired by exchange of its own bonds therefor, bought such stock for cash. By December 31, 1929, it had acquired 58,742 of the 65,000 shares outstanding.

As the charter of the New Jersey Company was to expire in 1940, Mr. Prince, at some date not clearly fixed by the testimony, formed the plan of accumulating cash in the respondent's treasury sufficient to pay the debts of the New Jersey Company and liquidate it by that time. To do this it would be necessary to redeem the outstanding preferred stock at par, pay off the $14,000,000 mortgage and over $6,000,000 of fixed obligations of subsidiaries which had been guaranteed by the New Jersey Company. It would also be necessary to purchase 6,258 shares of New Jersey common not then owned. Thus, as of December 31, 1929, the plan involved the expenditure of about $28,000,000 by 1940. If it could be consummated, the taxpayer would then own the entire stock yards enterprise clear of debt other than its own bonds then outstanding in the amount of $3,227,000 due in 1961. That enterprise, treated as a whole, then had cash and liquid assets amounting of $21,705,185,[5] and fixed and other assets of a book value of $40,000,000. The bulk of the liquid assets had been drawn up into the respondent's treasury by virtue of the agreement with the New Jersey Company's stockholders.

The respondent's assets December 31, 1929, exceeded its liabilities, including its capital stock, by $19,622,355. From that date to the close of 1933 its earnings were $10,243,373, of which

[4] He placed some of the stock in trust, retaining voting control.

[5] Including some $2,000,000 of impounded charges not released to Transit Company until 1932 and a working fund claimed by respondent to require $5,000,000.

$1,600,000 was paid out in dividends, and $8,643,373 was added to earned surplus.[6]

These are the salient facts. They are stated in greater detail by the Board and by the court below.

The Board reached these conclusions: That the respondent was a mere holding or investment company as defined by § 104, and had not overcome the consequent presumption that its surplus had been accumulated for the purpose of avoiding surtax upon the earnings of Mr. Prince, as sole stockholder; that, although it was more than a mere holding or investment company, its profits had been permitted to accumulate beyond the reasonable needs of the business, and the evidence did not overcome the prima facies which § 104(b) attributes to this fact; and that, without the benefit of the presumptions created by § 104(b), the proofs require the conclusion that the respondent had been availed of for the purpose of accumulating profits beyond its needs for the purpose of avoiding surtax upon its stockholder.

The Circuit Court of Appeals held that, viewing the facts most favorably to the Government, the respondent was not a mere holding or investment company within the meaning of the statute; that, in concluding the company had accumulated profits beyond its reasonable needs, the Board had employed a wrong yardstick in that it had failed to give weight to the controlling purpose of the accumulation, namely, the long range plan to liquidate the New Jersey Company and consolidate all the assets, free of debt, in the respondent; and, finally, that, in purporting to reach its final conclusion without reference to the statutory presumptions, it had allowed them to affect its judgment. Accordingly the court reversed and directed the Board to retry the case in conformity to the court's opinion.

The petitioner urges acceptance of the Board's first conclusion that the respondent was a mere holding or investment company. He says that the taxpayer was nothing but a pocketbook for Mr. Prince who, as an individual, managed and controlled the

[6] This item included additional cash on hand of $2,755,931 ($1,800,000 of which was a subordinated deposit in a stock yards bank), loans to subsidiaries and to Mr. Prince, purchases of common and preferred stock of the New Jersey Company and of respondent's own bonds, and other investments, and an investment of $3,573,218 in securities of stock yards banks which needed financial support. Similar subordinations of deposits and bank investments were made by subsidiaries.

entire enterprise and used the taxpayer merely as a repository of surplus earnings which were intended ultimately to be used for his benefit. We find it unnecessary to consider this contention, since we think the Board's decision may be supported apart from any presumption arising under the terms of the Act.

The respondent was not formed for the purpose of avoiding surtax on its stockholders. No such exaction existed in 1911. Until some effort was made by legislation to reach and tax accumulated and undistributed surplus, the taxpayer's dividend policy was immaterial. Accumulation of profits in its treasury was of no tax significance and, so far as appears, it was otherwise a matter of indifference, legally speaking, whether surplus moneys were allowed to remain in the treasury or were paid in dividends.

The series of acts which sought to discourage such accumulations had its origin in 1913 with the imposition of an additional tax on the shareholder rather than on the corporation.[7] The additional tax was laid on the corporation by the Revenue Act of 1921 and this method was retained in subsequent acts to and including that of 1932.[8] As the theory of the revenue acts has been to tax corporate profits to the corporation, and their receipt only when distributed to the stockholders, the purpose of the legislation is to compel the company to distribute any profits not needed for the conduct of its business so that, when so distributed, individual stockholders will become liable not only for normal but for surtax on the dividends received.

A corporate practice adopted for mere convenience or other reasons, and without tax significance when adopted, may have been continued with the additional motive of avoiding surtax on the stockholders. The Board's conclusion may justifiably have been reached in the view that, whatever the motive when the practice of accumulation was adopted, the purpose of avoiding surtax induced, or aided in inducing, the continuance of the practice.

The Board, the court below, and the parties in brief and argument have discussed many facts thought to be relevant to the

[7] Act of Oct. 3, 1913, ch. 16, 38 Stat. 114, 166-167; Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1072.

[8] Revenue Act of 1921, ch. 136, 42 Stat. 227, 247-248; Revenue Act of 1924, ch. 234, 43 Stat. 253, 277; Revenue Act of 1928, ch. 852, 45 Stat. 791, 814-15; Revenue Act of 1932, ch. 209, 47 Stat. 169, 195. In later revenue acts a different method of accomplishing the purpose has been adopted.

purpose of the accumulation of surplus by the respondent. The interrelation of the taxpayer and the other corporations involved in the enterprise, the expiration of the New Jersey Company's charter, the policy or obligation of the taxpayer to provide for the payment of the debts of the New Jersey Company and its subsidiaries, the relation of Mr. Prince as officer and active manager of underlying corporations, the financial transactions between him and the respondent, are discussed and arguments pro and con are based thereon in an effort to prove or to disprove the character of the respondent, the necessities of its business, and the nature of the relationship between it and Mr. Prince.

If we eliminate these matters from consideration and treat the respondent as a controller, manager, and, to a large extent, the proprietor of the entire enterprise, we think the Board's conclusion of fact has support in the evidence and must be accepted.

The respondent launched its corporate activities with partners and co-investors in the stock yards enterprise. The New Jersey Company, which then embraced the entire business, had a capital investment represented by stock and bonds of not less than $27,000,000. In 1911, when the respondent was organized, the enterprise had a net worth of at least $16,000,000.[9] The respondent, with a paid-in cash capital of $1,000,000, purchased[10] the right to receive the net earnings of the enterprise after the payment of the New Jersey Company's fixed charges, operating expenses, and the guaranteed dividends on its stock. The respondent's goal was the acquisition, by the year 1940, of the interest of all others having any capital share in the enterprise, and the method pursued was to accumulate current earnings[11] so that, by 1940, they would be available for such capital investment. This investment would, of course, redound to the benefit of the holder or holders of the respondent's stock. The situation

[9] The net worth was probably some $3,000,000 in excess of the amount named if the actual net worth of subsidiaries is taken into account.

[10] When the plan and agreement with respect to New Jersey Company's common stock was in shape to be consummated, the respondent purchased the plan and the rights arising under it for $1,000,000 (its cash capital), and $7,000,000 par value of its own stock arising out of an increase of its authorized stock from $1,000,000 to $8,000,000.

[11] The respondent has paid substantial annual dividends, the highest being at the rate of $400,000 per year during the taxable years in question; and Mr. Prince has also received substantial salaries from the respondent and other corporations which were conducting activities of the enterprise.

disclosed is, in legal effect, similar to that presented in *Helvering* v. *National Grocery Co.*, 304 U. S. 282. There the surplus earnings were invested in securities unrelated to the business in hand and were, and would remain, available for whatever purposes Kohl, the sole stockholder, determined. Here the accumulated earnings became available to the investment purpose and program of Mr. Prince, the sole stockholder of the taxpayer, or for other purposes as he might determine. By the use of the taxpayer's corporate personality Mr. Prince could plow the earnings of the enterprise into a capital investment which would convert, by 1940, an original capital venture of $1,000,000 into free assets of a value in excess of $60,000,000. And this without the payment of taxes[12] or surtaxes on the bulk of the earnings. Although Mr. Prince denied any purpose to avoid surtaxes, the Board, as in the *National Grocery* case, was free to conclude, upon all the evidence, that such was the purpose.

The respondent's position is that, as the New Jersey Company's charter was to expire in 1940, and as respondent was under what it deemed a moral, and, indeed, a legal obligation to pay off the mortgage debts of the New Jersey Company and its subsidiaries and to redeem its outstanding stock, the accumulation of earnings was necessary to the preservation of its business. There are two sufficient answers. Mr. Prince, the sole stockholder, if in receipt of the respondent's earnings, could equally well have done what the respondent proposed to do, that is turn accumulated earnings into invested capital. And the evidence shows that the New Jersey Company's charter could have been renewed in 1940. Continuance or refinancing of such an enterprise on the face of things would have been practicable.

We cannot say that the Board's conclusion that respondent was availed of for the purpose of preventing the imposition of surtax upon its stockholders, through the medium of accumulation of its profits, is without substantial support.

The judgment is reversed.

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[12] Most of respondent's income consisted of dividends received from domestic corporations which were deductible from its gross income for tax purposes.